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Supreme Court, U.S.
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In The

# *Supreme Court of the United States*

H. Richard Austin,
*Petitioner Pro Se*

vs.

Downs, Rachlin & Martin,
Harold Eaton, Esq.,
Gregory Clayton, Esq.,
*Respondents*

**On Petition for Writ of Certiorari**
**To the United States Court of Appeals**
**for the Second Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Can attorneys, who obtain a fraudulent judgment on behalf of the client, shield themselves from damages in subsequent litigation by claiming to be "privies" with the client and hence entitled to a "res judicata" defense?

2) If scientific evidence is found at a trial to be "valid" on any grounds - ("validity" - *Daubert v. Merrell Dow*, 509 US 579 (1993), does that necessarily mean that the evidence is not falsified, thus excluding the possibility that such evidence can be determined subsequently to be fraudulent on the basis of late-discovered information ("collateral estoppel")?

3) Because a "full and fair opportunity" goes to the essence of Due Process, doesn't the lack of such an opportunity exclude a res judicata/collateral estoppel defense regarding a prior judgment, especially if the prior judgment is fraudulent?

4) Because the trial judge is the "gate keeper" for the admission of expert, scientific evidence, shouldn't the use of such evidence that is fraudulent constitute a "fraud on the court?" (Attorney Oath of Admission?)

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## OPINIONS BELOW

The judgment in the District of Vermont (06-cv-38) was entered on August 24, 2006 (Appendix No. 6) and affirmed by the Court of Appeals for the Second Circuit (06-4203) on March 19, 2008) (Appendix No.7).

At issue in this petition regarding these two orders and other prior orders in the courts below are various errors but principally the erroneous interpretation of two, key legal concepts relevant to the dispute: 1) attorneys are "privies" with their client and therefore protected from subsequent litigation concerning the judgment obtained, including one that is fraudulent ("res judicata"), and 2) a determination at a trial that scientific evidence is "valid" necessarily means that it is not falsified and therefore cannot be challenged subsequently on the basis of late-discovered fraud ("collateral estoppel"). The effect of these two errors operating in concert has been repeatedly to thwart FRCP 60b, especially the savings clause, and also Due Process itself, needlessly perpetuating this dispute for several years.

## JURISDICTION

The appeal comes before the Supreme Court pursuant to 28 USC 1254 and is taken from the order of the Court of Appeals for the Second Circuit (March 19, 2008).

## CONSTITUTIONAL PROVISIONS INVOLVED

Due Process Clause.

## SUBJECT MATTER

This long-standing dispute concerns a conspiracy involving a national insurance company, attorneys,

experts and others, who falsified scientific evidence of arson in order to void a homeowners policy. The conspiracy, which utilized professionals in several states, commenced only a few days after the subject house fire and long before any dispute arose concerning the fire itself or the relevant insurance. The prompt, almost routine way the conspiracy was initiated indicates that some of these individuals had considerable experience in this type of activity. The broad significance of this case lies in the fact that such fraud directly undermines the national institution of homeowners insurance on which the owners of homes across the U.S. depend so they will not face potential financial ruin in the event of a casualty.

The "scheme" engineered by these attorneys and experts on behalf of their client eventually became a systematic attack on the judicial process and demonstrates how far some attorneys are willing to go to undermine applicable legal standards. This includes the burdens of proof regarding house fires that have developed in state substantive laws over more than a century and also federal procedural law, especially regarding the admission of expert (scientific) evidence (*Daubert v. Merrell Dow*, 509 U.S. 579, 125 L.Ed.2d 469 (1993)).

The undisputed facts also illustrate how easy it is in many situations to falsify expert (scientific) evidence. Expert witness fraud gives an enormous advantage to litigants with the capability to perpetrate such a deception that makes fair trials impossible. It is the natural inclination of an insured party to rely on the insurance company's expertise to determine a fire's cause - an inquiry that is basically scientific in nature. However, this predictable attitude

creates a situation that can invite the type of fraud involved here against which the average homeowner is virtually defenseless. Once such falsified evidence is in place, it can be very difficult to dispute it effectively after the fact. A fire scene deteriorates rapidly. Typically it is exposed to the elements, and after it has been evaluated, most of the relevant evidence has been affected or no longer exists so it can be meaningfully re-examined. When the fraud has finally been discovered, most or all of what is available has been crafted for the purpose of perpetrating the fraud. In the instant case, a small, detectable error was made while creating the fake evidence, and only for that reason was it possible years later to expose the fraud.

The subject fire occurred on November 12, 1993, completely destroying Petitioner Austin's home in Warren, Vermont. The structure and contents were insured by a homeowners policy issued by the Hanover Insurance Company (hereafter referred to as 'Hanover') - a subsidiary of the Allmerica Financial Corporation, a financial conglomerate listed on the New York Stock Exchange. The amounts of coverage under the policy had been determined by the company and their agent and approximately equaled the loss. Subsequently all terms for indemnification were complied with, including the Proofs of Loss that establish the financial parameters of the claim and were accepted by Hanover as fair and accurate. Thus the compensatory damages are liquidated. A few weeks after the fire, Hanover was informed that the purpose of the claim was the prompt reconstruction of the dwelling, and a qualified builder acceptable to the insurer was chosen by the insurer's agent. Over a period of months extensive preparations were made with the builder to commence reconstruction as soon

as the weather permitted. Nonetheless, just as the spring building season arrived, the insurer voided the policy on the grounds of arson and refused to permit reconstruction.

The resulting litigation commenced with an action against the Hanover in August 1994 and ended with an adverse judgment on August 1, 1997 after a jury trial devoted almost entirely to the issue of fire causation. During the trial, the insurer did not produce any evidence regarding the essential elements of opportunity and motive. Fraud was not at issue. About a year and a half after trial, however, information was obtained that demonstrates conclusively the judgment was obtained through a conspiracy to fabricate "scientific" evidence admissible in court that would provide the misleading impression the subject fire was deliberately set ("incendiary"). Thus, the fraud went to the heart of the insurer's legal case, establishing through devious means the element that has become indispensable (sine qua non) to the so-called arson defense to liability - definitive proof that a fire was in fact deliberately set ("must find...that the fire was of incendiary origin.) *Westchester Fire Insurance Company v. Deuso,* 146 Vt. 424, 426, 505 A.2d 666 (Supreme Ct. - Vermont (1985)).

The cases from across the country cited in *Deuso* indicate that any circumstantial evidence relied upon in this regard must be very strong. Some examples: *Boone v. Royal Indemnity Company,* 460 F.2d 26, 28 (10th Cir. - 1972) - ("Several pounds of explosive substance had been placed in the building ... explosion preceded the fire..."); *Gregory's Continental Coiffures and Boutique v. St. Paul Fire and Marine Insurance,* 536 F.2d 1187, 1188 (7th Cir. - 1976) - ("...five plastic drums in the shampoo room...contained gasoline...");

*Great American Insurance Co. v. K&W Log. Inc.* 591 P.2d 457, 459 (Court of Appeals, Washington, 1979) - ("...600 to 700 pounds of Trojan dynamite had been used...").

To meet this substantial burden, the opinion of experts in fire investigation is generally used. Federal standards control the admissibility of such evidence including *Daubert v. Merrell Dow.* The conspiracy involved here accomplished the objective of thwarting these standards by cleverly mimicking the relevant science. The hard evidence that allegedly supported the investigation was falsified lab tests of some sort of material that didn't come from the subject fire site. In this way the participants unlawfully manipulated the situation so anything might be proven regarding the fire's cause that would serve the insurer's objective of avoiding financial liability.

The other, key aspect of the scheme was the on-going campaign engineered by Hanover's attorneys to thwart the judicial process so it could not function correctly and the fraud detected. Thus, the required "full and fair opportunity" for petitioner was completely absent. Furthermore, the dishonest way in which the attorneys dealt repeatedly with the court became at times so flagrant this complex fraud ultimately rose to the level of "fraud on the court" (*Hazel-Atlas Glass v. Hartford-Empire Co.*, 322 US 238, 88 L.Ed. 1250 - 1944). As a result, the trial turned into a textbook example of how to trick both the court and a lay jury regarding a complicated, scientific issue. Throughout the litigation these "officers of the court" also repeatedly violated their Attorney Oath in the State of Vermont - (Appendix No. 1): "You do solemnly swear/ affirm that you will do no falsehood, nor consent that any be done in

court..."

## REVIEW OF THE CASE

### 1) Investigations Of The Fire Site

Pursuant to a voluntary release provided by petitioner, Hanover conducted the investigation of the site that was supposed to determine the fire's cause. The work for the insurer was done by Douglas G. Peterson & Associates, Greenfield, Massachusetts, an engineering firm that investigates fires across the United States. The investigators were given unrestricted access to the site that was left untouched for almost a month so any follow-up might be performed. The debris was finally removed when winter weather set in so the foundation could be protected. Over several years petitioner personally built much of the house that contained many unique, features, including a complex, electrical system with computer and satellite dish components. As a result, he considered it essential to identify the fire's cause prior to reconstruction. To this day, he still considers the woodstove the most likely cause. It served as a back-up source of heat to a hot-water, oil fired system with multi-zones covering the entire structure. The stove, that was on the ground floor, was connected to a tall chimney with a strong draft and had previously overheated, resulting in two, chimney fires that damaged the flue tiles.

Relying on the insurer's commitment to share the results of its examination, petitioner did not have his own investigator. This commitment was not kept, and some preliminary information regarding Hanover's supposedly "scientific" evidence of arson was only obtained through a court hearing and order in mid-1996, or more than two and a half years after the fire.

As a means of broadening the resources brought to the investigation, petitioner also provided a voluntary, unrestricted release to the Vermont State Police so they could participate in the work at the site. He did so assuming they possessed some specialized expertise that might be helpful. Their investigation took place on November 15 and 16 and utilized a dog trained to detect petroleum-based substances in fire debris. The dog reacted a number of times in the ground-floor, media room that for eight years was the former garage. In that area, petitioner once kept his cars and worked on various machinery. Tests performed at the New York State Crime Lab were all negative, and it has never been determined what the dog might have detected. The officer (Harrington), who performed the police investigation, admitted at his sworn deposition that no one knows what the dog detected. During the trial he stated otherwise while under oath before the jury.

The insurers' investigator, George Wilson of Douglas G. Peterson, was present during the police investigation and also worked there by himself on November 24. On that occasion he examined the former utility/laundry rooms, the only area on the ground floor not examined by the dog. Wilson's work on the 24 provides the basis for his report that supposedly established by recognized, scientific procedures that the probable cause of the fire was an accelerant being poured in the laundry room. On its face the report appears to be very professional. It utilizes technical terminology in abundance and mimics the methodology accepted in the field. In this way, the illusion of scientific objectivity was created. The information that has emerged over several years, however, demonstrates conclusively that the report is

a cynical fabrication intended to serve the objective of thwarting petitioner's insurance claim.

**2) Experts' Revealing Mistake**

While at the site on November 24, George Wilson took numerous photographs and collected eight samples from the utility/laundry room area. This debris was supposedly shipped to the Mercury Research Lab in Cary, North Carolina, where analytical tests were performed on a Hewlett Packard gas chromatograph/mass spectrometer (GCMS). It is further alleged that two of the eight samples tested positive for an accelerant initially identified as kerosene. Later, this was changed to No.2 fuel oil or home heating oil.

It is now beyond reasonable doubt, however, that the tests were ordered from the lab before Wilson returned to the site on the 24 for the purpose of fabricating a report that would utilize the fake tests. In essence, these tests were intended to provide the hard evidence supporting the falsified opinion of arson that Douglas G. Peterson was being paid to produce under the guise of scientific inquiry. Apparently, carelessness born of over-confidence caused the scheme to unravel and eventually the truth emerge regarding the insurer's so-called "scientific" evidence.

The two, allegedly positive tests are dated November 25, 1993, 2:32am (sample #4) and November 25, 1993, 4:00am (sample #6). Such a date/time is generated automatically by the GC/MS at the inception of a test and encrypted along with the rest of the data in binary code (computer language). It cannot be altered later without destroying a significant portion of the test file. The date/time is produced by an internal clock that runs automatically

even when the computer is turned off because it is supported by a CMOS battery. These batteries are very reliable and long-lasting. In the unlikely event that one failed, any date/time would be lost along with the computer's BIOS (basic in/out or operational instructions). Hence, the computer would not be able to function correctly when the GCMS was restarted. It would, of course, be impossible not to notice such a situation.[1]

Having spent most of November 24 at the site, Wilson had to drive back to the offices of Douglas G. Peterson & Associates in Greenfield Massachusetts (about five hours), sort and package the samples and ship them to Cary, North Carolina, which is about one-thousand miles away. After reaching the Mercury Lab, they had to be unpacked and undergo extensive preparation. This last step is an overnight process. All of this, including transport over such a long distance, would have to take place in only a few hours so the tests could be performed in the early morning of November 25. Obviously this is impossible. Hanover's experts have not been able to provide a scientifically plausible explanation for the date/time discrepancy contained in the lab tests that allegedly support George Wilson's opinion of arson. Instead, on the sworn record they have repeatedly made false

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[1] For further details, excerpts are provided from the sworn statements of Mr. Jay Chrystal, President and Lab Manager of ChemServe, Milford, New Hampshire, an environmental testing lab accredited nationally (Appendix No. 8), and Donald Hesse, a chemist and software engineer from Saint Louis, Missouri (Appendix No. 9). Chrystal and Hesse had at the time almost 40 years of experience in the testing field, which includes working with Hewlett Packard GC/MS equipment. Their complete statements are attached to the Complaint 06-cv-38 (VT).

statements that contradict basic, scientific facts regarding the design of a GC/MS as well as the lab's written documents.

### 3) Trial Testimony Of Concealed Witness (Lab Director)

At the trial Jimmy Pau, technical director of the Mercury Lab, who for several months could not be located, provided deliberately false testimony with the assistance of attorney Gregory Clayton in order to deceive the jury about the tests. According to Pau, the samples didn't reach the lab until November 30 and the tests conducted on December 1. He attempted to explain the date/time discrepancy by alleging that the computer in the GC/MS had been turned off for six, straight days because of electrical problems in the Cary, North Carolina area. Allegedly this stopped the internal clock that generates the date/time. Thus, when the computer was turned back on so the tests could be conducted, there was the discrepancy of six days. As Pau stated falsely under oath: "You have to set the date and the time...after you turn it off, you have to reset it...you need to reset the clock <u>every time you run that</u>." This explanation is obviously false and contradicts the way the clock in this GC/MS's computer functions, including the fact it is supported by a battery. Since there is this reserve source of power, it isn't necessary "every time" to reset the clock which continues to run on its own. Furthermore, Pau testified that when the tests took place, lab personnel didn't notice that the computer generated an erroneous date/time six days before the date when the tests were supposedly performed. However, an electronic clock, such as that in a GC/MS's computer, is not like a mechanical clock that continues to

display the time when it stopped running. In the event the source of power stopped, any date/time would be lost along with the computer's operational instructions (BIOS).

Equally revealing is the fact that Pau's pivotal testimony is disproved by the lab's written correspondence related to the analytical tests. The letter of November 30, 1993 to Douglas G. Peterson refers to the samples identified by the dog, and the letter of December 2, 1993, also addressed to Peterson, to the samples supposedly acquired by Wilson on November 24. In these documents, which review the test procedures employed, reference is made to the lab's "quality assurance program," that was performed immediately prior to testing so the GC/MS would function correctly. As stated: "A quality assurance program was incorporated into the standard analytical operating procedure. The QA program consists of a daily auto-tune of the mass spectrometer and a standard calibration run on the GC/MS system. This program ensures the proper calibration of both GC and MS instrument." (emphasis added). Since this "auto-tune" program was being conducted on a "daily" basis, the computer that controls the equipment could not have been turned off for six, straight days. Furthermore, it is totally implausible that after just conducting a quality assurance review of the GC/MS prior to testing, the operator didn't notice that the computer that controls the equipment wasn't functioning correctly. Based only on this written evidence from the lab itself, there is no other possibility except that Pau's explanation of the date-time discrepancy given under oath before the jury is deliberately false and the tests a fraud.

Subsequently personnel at the lab inserted a date

at the top of the chromatograph (test diagram) in an area where - unlike the body of the test results - information, such as a title or file designation, can be added later. At the trial, Pau admitted this date was put there after the tests. The date/time discrepancy was the result of an unanticipated change in George Wilson's schedule. Originally he returned to the site on November 22. However, petitioner would not allow him to proceed without assurance that the results of his work would be shared. Hence, he had to come back on the 24, causing the discrepancy, which resulted in the fraud being detected.

### 4) Concealing The Scheme

After the litigation commenced, attorneys Harold Eaton of Eaton and Hayes, Woodstock Vermont, and then Gregory Clayton of Downs, Rachlin and Martin, Burlington, Vermont, and later Aten, Clayton and Eaton, conducted an ongoing campaign to thwart discovery. This included generating in increments additional, falsified evidence in order to stay a step ahead of the inquiry. During that period, Hanover never willingly complied with any discovery request. Also, the insurer did not voluntarily produce for deposition the experts connected to its own fire investigation. Afterward, neither Wilson or Pau would sign their depositions - something that is not typical of truthful, scientific experts. Next, Pau abruptly disappeared "somewhere abroad" so his deposition could not be completed. He absented himself just when the transcript of the initial portion of his deposition became available. When petitioner contacted lab personnel trying to ascertain where Pau was located, Attorney Clayton repeatedly threatened sanctions, making clear his determination to prevent

further contact with this important, material witness. Since Pau did not reappear until discovery was closed, petitioner was unable to finish questioning him about the falsified tests.

After Pau finally resurfaced, he cooperated with Attorney Clayton to produce a forged document falsely attributed to the prestigious American Society of Testing and Materials. This includes a cover letter from Clayton (November 25, 1996) endorsing the document as authentic. The immediate purpose of this deceptive act was to nullify an important court order regarding relevant information promised by Pau at his initial deposition. However, this spurious document was only produced after discovery ended so Pau could not be questioned about this subject as well. Thus, in the ongoing effort to protect the fraud, Hanover and its surrogates, including the attorneys, were even willing to engage in gross forgery regarding one of the country's most important, scientific organizations (ASTM).

### 5) Experts' Attempt To Scuttle Their Own Project

Of significance is the fact that while discovery was in progress, Wilson and the other experts tried intermittently to undermine their own opinions so they would be excluded by the court. Having become aware of the date/time discrepancy, they apparently acted in this fashion out of concern for potential adverse consequences. Based on this dispute, it is apparent that when faced with a fraudulent project gone awry, experts such as these provide themselves with what amounts to an escape route. Thus, if the fraud shows signs of not holding together, they discredit their opinions and derail the project after

extracting from it whatever gain can be realized.

As a result, at his deposition (August 6, 1996) Wilson explicitly repudiated his own fire investigation. The focus of his supposedly authoritative report is a so-called "accelerant pour pattern" allegedly found on the laundry room floor. Nonetheless, during his deposition, Wilson stated under oath that "I don't believe I indicated where an accelerant was actually poured...How much was poured or where it was actually physically poured, I do not know.." In addition to a detailed drawing of the alleged pour pattern, Wilson took numerous photographs and also wrote about the area where the accelerant was allegedly poured - a finding supposedly verified by GC/MS lab tests. Nonetheless, he later stated under oath that he had no idea where any accelerant could have been poured. Obviously this is not normal behavior by anyone, especially an experienced, highly paid expert. With discovery thwarted, however, Wilson reappeared at the trial and once again reversed himself, stating that he really did find what he stated in his report.

The explanation that the experts were trying to scuttle their own project is supported by the fact that at various times the other experts committed their own self-defeating contradictory acts. This includes the lab changing its opinion about the identity of the substance allegedly found - at first kerosene (a "light" distillate) and later No. 2 fuel oil or home heating oil (an "intermediate" distillate). Also, both Pau and Stephen Houghton, director of fire investigation services at Douglas G. Peterson, demonstrated an inability to classify properly these two substances.

### 6) Fabricating Additional, Fraudulent Evidence

While exhibiting an obvious concern for adverse consequences, the experts nonetheless continued to participate in the scheme and thereby earn additional sums of money for their "scientific" research. Thus during discovery, Hanover and its operatives, including the attorneys, utilized the discovery period to fake additional evidence in the ongoing effort to salvage the scheme. This involved the direct participation of Stephen Houghton, who previously remained in the background supervising George Wilson. (Apparently at this point, Wilson was no longer willing to participate in further "scientific" research.) Houghton traveled to the site in Warren and supposedly obtained a liquid sample from the underground fuel tank on the property that for almost three years was unattended. At the time it was in the midst of a construction project to build a house for the new owner of the property. Another test was performed, and not surprising, it allegedly established with appropriate validation that the accelerant that was never actually found came from the tank.

The letter of June 21, 1996 from the Mercury Lab makes clear how closely the attorneys were now monitoring the activities of the experts so no further mistakes would be made. Previously, when the original, falsified tests were produced, the letter from the Mercury Lab (November 30, 1993), regarding the samples identified by the dog, and the letter (December 2, 1993), regarding the samples allegedly acquired by Wilson, were both addressed to Stephen Houghton. In turn, he wrote to Attorney Harold Eaton about the matter. However, after the dating problem arose, all the correspondence from the lab went to

Attorney Clayton, who was exerting a direct control over the production of the fraudulent evidence. This continues with the letter dated March 6, 1997 from the lab (also addressed to Clayton) that concerns the next step in the campaign to prop up the scheme.

With the spurious conclusion established that the alleged accelerant originated from the underground, fuel tank, Attorney Clayton with the help of the various experts engineered the production of a final piece of false evidence in the ongoing effort to reinstate the credibility of the initial, falsified tests. This fakery conveniently made its appearance just as the case was placed on the trial calendar. It consisted of some paper stuffed in a gallon tin can partially filled with fuel oil. The item was produced by Officer David Harrington of the Vermont State Police more than three and one-half years after the fire. Harrington suddenly produced the mysterious substance in the can in spite of the fact that during his deposition on July 2, 1996 (almost a year before Austin was actually informed), neither he or Attorney Clayton disclosed the existence of this allegedly relevant evidence in response to repeated, emphatic questions about any relevant, "physical" items "in the possession" of the Vermont State Police.

At the pretrial conference on July 1, 1997, Attorney Clayton in a direct, verbal exchange deliberately deceived the trial judge, who was new to the case, regarding the timing when petitioner was actually informed about the substance in the tin can. Clayton's statement to the court: "The moment we got that report back from the lab we sent this to Mr. Austin..." However, compare this statement to the letter from the lab dated March 6, 1997, in which the results of the test on the substance in the can were

first reported to Clayton, and his cover letter dated May 21, 1997, when the information was finally sent to petitioner, or almost three months later than Clayton alleged falsely to the judge in open court. Also note the letter to Clayton dated May 19, 1997 belatedly generated by Stephen Houghton, in which the attempt is made to give the false impression that Clayton just learned about the test results. However, in explicit language the letter from the Mercury Lab (March 6) demonstrates otherwise.

Allegedly the item that appeared so suddenly was the newspaper (copy of the Wall Street Journal) found after the fire on the front lawn near a stump petitioner was cutting up with a chainsaw. The real newspaper, which originally was in his wheelbarrow, had been lying there about a month. At the trial, petitioner for the first time saw the item, which definitely was not what had been on his lawn. Ultimately the can of foul-smelling oil ended up in the jury room. Presumably, the objective was to provide corroboration of arson through something independent of the falsified tests that might still be regarded as suspect. The acrid smell from the can would have pervaded the jury room, producing a confusing, psychological impression on its members already prejudiced by days of falsified "expert" testimony orchestrated by Attorney Clayton. Essentially, this was the proverbial *coup de grace* of what amounted to a protracted, dramatic performance. In all, four experts (Pau, Wilson, Houghton and Harrington) perjured themselves regarding the fraudulent evidence in order to legitimatize it in the eyes of the jury. To augment the smelly substance in the can, the senses of the jury members were further impacted by impressive displays (three-feet in length), which allegedly

depicted in vivid color the pour pattern that George Wilson previously stated under oath that he never found. All of this commenced with a lengthy dissertation by Officer Harrington on the "science" of fire investigation. In his testimony Harrington, an experienced fire investigator, who is also an instructor in the field, admitted that all along he possessed the Douglas G. Peterson internal file that of necessity contained all the information relevant to the fraud. Although the experts' prior, inconsistent behavior, which includes Wilson repudiating under oath his own fire investigation, was drawn repeatedly to the jurors' attention during cross-examination, they chose to ignore these highly relevant contradictions.

A final point regarding *Austin I* should be noted. During a significant portion of the pretrial, the district judge (Sessions), who originally handled the case, was ill and ultimately experienced a heart attack. As a result, the voluminous file was repeatedly transferred and ended up in the hands of the trial judge shortly before the trial. This unfortunate situation presented Hanover's attorneys with an invaluable opportunity to perpetrate this elaborate fraud that that they utilized to the fullest.

## PRIOR LITIGATION AND ORDERS

During a period of almost 14 years, there have been four lawsuits (*Austin I, II, III and IV*) initiated sequentially by petitioner (as a pro se) in connection with the house fire. The first two actions were against the insurer and the two, subsequent actions involve the attorneys as defendants. Starting with *Austin II,* fraud became the contested issue. In *Austin I,* fraud was not in dispute. At no time during the lengthy litigation preceding *Austin IV* was the "claim" itself

derived from the homeowners policy or the fraud "issue" ever extinguished in regards to respondents/ attorneys, thus invalidating the current action.

In *Austin II, III* and *IV,* dismissals of the complaints pleading the fraud were granted in response to motions to dismiss (12b(6)) that did not contest the evidence in any specific way but instead falsely invoked a res judicata/ collateral estoppel defense. During all this time not a single word has ever been produced from the trial record in *Austin I* that justifies preclusion on the either grounds. Thus petitioner has repeatedly been denied Due Process regarding the fraud visited upon him. Instead the litigation has been perpetuated needlessly over several years because of repeated error in the courts below, especially regarding the legal concepts of "privies" and what constitutes "valid" evidence. (The relevant orders are in the Appendix Nos. 2-7 with key points highlighted in bold type.)

The first of the four lawsuits was filed in Missouri state court in mid-1994. The case was removed by the insurer to federal court and the venue changed to Vermont (95-cv-170 - *Austin I*). The moving papers, submitted by the insurer in alleged good faith to the Eastern District of Missouri, claimed that the venue change was essential to the equitable disposition of the dispute. The grounds cited were almost exclusively the fire investigation and related materials that supposedly existed in Vermont. All of this supposedly significant evidence subsequently proved to be fraudulent. In essence, the purpose of moving the case halfway across the country was to facilitate an elaborate fraud.

Discovery commenced in August 1995, extended over a period of 14 months, and was never completed.

Following the five-day, jury trial preoccupied almost entirely with the issue of fire causation, the adverse judgment was entered - the trial little more than a cleverly executed dramatic performance based on fake science. An appeal to the Second Circuit (97-9069) citing various errors (mainly procedural) before and during the trial, was rejected n November 12, 1998. A petition for certiorari was also denied.

About one and a half years after the trial, petitioner finally obtained information that demonstrates conclusively the judgment was based on fraud. During that period, petitioner reviewed the subject matter with numerous experts in the lab testing and fire investigation fields, including the two, highly qualified experts whose testimony is relied on in this action. At this point there is no possibility that the subject tests were not falsified as well as the insurer's entire fire investigation. As a result an independent action (FRCP - 60b - savings clause) - (September 2, 1999) was initiated, citing both fraud inter parties and fraud on the court (99-cv-252 - District of Vermont) - (*Austin II).* The complaint includes extensive, supporting documentation (70 pages), which is also contained in the current complaint (06-cv-38 (Vt.)). While not denying the fraud, the insurer responded with a motion to dismiss (12(b)(6)), alleging res judicata on spurious grounds, including that certain, post-trial motions had been submitted concerning the fraud. Such motions have never been produced, and their alleged existence is denied by the court docket. (Recently the respondents /attorneys reasserted this false statement in another attempt to influence the court improperly.) In spite of the fact that nothing from the trial record was produced supporting such a defense, the action was

dismissed, the court concluding in a brief , enscribed order that it was barred by res judicata. Subsequently an appeal to the Second Circuit (99-9375) was denied by a motion's panel (May 4, 2000) in connection with a motion seeking reduction of a bond granted after the appeal was docketed at the Second Circuit (Appendix No.2). The denial occurred without briefs being submitted on the fraud issue so the court could not have been familiar with the subject matter. This is made clear by the fact the court cites in its brief opinion *In Re Teletronics Services, Inc.*, 762 F.2d 185, 190 (2d.Cir.-1985), a case that quotes the well-known definition of res judicata contained in *Commissioner v. Sunnen*, 333 U.S. 591, 597-8 (1948), where fraud is noted as an exception.

A petition for a writ of certiorari to the U.S. Supreme Court followed, and the insurer responded with a waiver, once again not challenging the facts that document its fraudulent activities. The petition was denied on October 10, 2000. Based on the waiver, two motions for relief were then submitted to the district court, both of which were also denied in one sentence, enscribed orders (November 7, 2000). Another appeal was made to the Second Circuit (00-9521), and after the submission of briefs and a hearing a clearly erroneous order was issued by a merit's panel (July 13, 2001) (Appendix No.3). The wording of this order indicates that the court never went back in the record beyond the recently rejected motions based on the waiver. As a result, the independent action and the extensive evidence of fraud that it contains was never examined. This conclusion is based on the fact that repeatedly (three times), the court refers to the document that supposedly initiated the action as Austin's ("first Rule

60 b motion") (p.2,ln.43; p.3, ln.6, p.3, ln.28). Since the court was unaware that an independent action was involved, it could not have known what it contains or reached a definitive conclusion on the evidence. Furthermore, the merit's panel takes note of *St. Pierre v. Dyer*, 208 F.3d. 394, 399 (2d.Cir. 2000), a case that emphasizes the principle that a dismissal not made on the merits (in this instance on jurisdictional grounds) does not extinguish a claim for damages. Subsequently certiorari in *Austin II* was denied.

On July 28, 2003, the next action (03-cv-204 - *Austin III*) was filed against the attorneys and experts who successfully executed the fraud on behalf of their client. The defendants/ respondents answered with another Rule 12(b)(6) motion, once again invoking both res judicata and collateral estoppel. Another dismissal was granted (November 3, 2003) in which the district court finally clarified its position. (Appendix No.4.)

As grounds for their spurious motions to dismiss in *Austin III*, respondents rely on misinterpreting a brief statement in petitioner's pretrial memorandum in *Austin I*. Alluding to the date/time discrepancy in the lab tests, the statement raises the question as to whether there was an error or an incorrect procedure was used at the lab when the tests were performed.

> "Whether the mass spectrometer/gas chromatograph tests at the Mercury Research Lab in North Carolina in the early morning of November 25, 1993 were actually performed on samples taken from the Warren fire site on the afternoon of November 24, 1993."

On the basis of that brief statement, which can be

interpreted in more than one way, respondents managed once again to perpetuate this unfortunate litigation. In its order the court concludes in error that since the scientific evidence in question was determined to be "valid" at the trial, the fraud issue must of necessity have been examined by the jury (ie the one issue (validity) of necessity implying resolution of the other (fraud)).

> ("In *Austin I,* Plaintiff raised the issue of the validity of the scientific evidence used by Hanover; Plaintiff did not convince the fact-finder that the evidence was fabricated; he had ample opportunity to litigate the issue in *Austin I*; and the conclusion that the evidence was not fabricated was essential for finding in favor of Hanover. Thus, collateral estoppel prohibits Plaintiff from re-challenging the validity of scientific evidence that he challenged in *Austin I.*") (November 3, 2003), p. 5.

The pretrial statement relied upon, however, does not mention fraud. At the trial the questioning of Jimmy Pau examined the date/time discrepancy in the GC/MS tests by inquiring whether some sort of a mistake was made.[2] Furthermore, the various experts' competency was contested by emphasizing their prior, inconsistent and at times unprofessional behavior. In *Austin III,* the district court also misapplies the concept of res judicata (including

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[2] Q. (by Austin) "Just let me ask you this, Mr. Pau. Was there any mistake made in your tests?..

A. I don't understand what you mean.

Q. Was there any mistake made in your laboratory regarding the testing of the samples sent to you by Douglas Peterson.

A. No, I don't think so.

Q. You don't think so. Okay..."

"privity") by stating that petitioner was trying to ("relitigate the same claim...by substituting new defendants,") citing *Nevada v. United States* 463 US 110. However, the Nevada case is a very different type of action, involving parties with similar, legal interests - ie privies. Petitioner contends that the current attorneys are not privies protected by their former client's unlawful judgment.

Subsequently, the dismissal in *Austin III* was upheld by the Second Circuit on collateral estoppel grounds (November 4, 2004) but not res judicata (Appendix No.5), the panel relying on the district court's erroneous interpretation of the term "validity" as it pertains to the relevant evidence.

> ("There is considerable overlap between the issues previously litigated and resolved in the prior actions and those which Austin attempts to raise in the instant case. At issue in *Austin I* and in *Austin v. Hanover Ins. Co.*, 14 Fed. Appx. 109 (2d Cir. 2001)(unpublished opinion), was the validity of the scientific evidence that was presented to the jury and subsequently the Second Circuit. Austin seeks to relitigate the validity of that evidence by styling the issues as fraud and fabrication of evidence. Austin had a full and fair opportunity to litigate these issues in *Austin I*, and the jury's determination that the evidence was not fabricated was necessary to support a finding in favor of the insurance companies. Thus, under the doctrine of non-mutual collateral estoppel, Austin was properly precluded from bringing the instant action.") (November 4, 2004), p.3.

The wording of the order also indicates that the requisite de novo review once again did not take place

so the panel could not have been aware of the extensive evidence of fraud that prevented the requisite "full and fair opportunity." ("We need not go further than affirm the judgment of the district court...." p.2). Another petition for certiorari was also denied.

In May 2005, petitioner filed the complaint of the current, independent action - Rule 60b - savings clause (*Austin IV)* in the Eastern District of Missouri (St. Louis), where the litigation commenced in mid-1994. The grounds were the fraudulent statements regarding evidence made to the court in order to change venue. The Missouri court declined jurisdiction and transferred the case to Vermont where a third unsupported dismissal (Rule 12b(6)) was granted, the district court repeating in its order the previous errors and adding others (Appendix No. 6). For instance, the court alleges that the appellate court in *Austin III* ("dismissed the claim, holding that it was barred by res judicata and non-mutual collateral estoppel.") As stated, the Second Circuit only affirmed on the basis of collateral estoppel. The court also refers back incorrectly to the appellate ruling in *Austin II*, where it was concluded that ("Austin's claims of fraud are barred by res judicata as those claims were and could have been raised in the trial court or on direct appeal to this court.") However, that action was against the insurer and not the current defendants. As stated, respondents are not "privies" with their former client and therefore shielded by that judgment. Thus, in both *Austin III* and *IV* the district court misapplies the concept of res judicata. (In its latest order the district court also mistakenly refers to the "complaint" as supposedly entitled a "petition," thus suggesting that the court

may not have actually examined the document.)

Recently the Second Circuit affirmed the district court's order in *Austin IV* (Appendix No. 7). Therein, the appellate court states erroneously that ("this appeal marks the fifth time that Austin has appealed to this Court a denial of claims related to his allegations that the defendants-appellees or their privies conspired to defraud him...") p.2. (emphasis added). Thus the appellate court also incorrectly confers on the attorneys/ respondents the status of privies with their former insurer client and hence entitled to protection on res judicata grounds based on the judgment in *Austin I.* Thus the court makes the mistake of concluding that this is the ("fifth time") the fraud issue was brought before the appellate court, including in the count the initial action (*Austin I*). Also, the court once again accepts (as in *Austin III*) the lower court's erroneous interpretation of the key term "validity" as it pertains to scientific evidence. Presumably, for that reason the court chose to disregard the extensive evidence of fraud in the complaint.

**No "Full and Fair Opportunity"**

None of the various orders (three in the district court and three in the appellate court (Appendix Nos. 2 -7) address petitioner's extensive and explicit evidence of fraud. As a result, he has repeatedly over a period of several years been denied Due Process. The evidence demonstrates unequivocally, however, that he was defrauded and also that the "full and fair opportunity" required to support preclusion was completely absent in *Austin I.* In its recent order (*Austin IV*), the district court relies on *Allen v. McCurry* 449 U.S. 90, 94-95 (1980). In *Moore's*

*Federal Practice 3d* [132.04(2c)], the commentator takes note of this case, stating that the "concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in earlier case," citing as precedent a number of Supreme Court cases including *Montana v. United States*, 440 U.S.147, 164 n.11 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); and *Blonder-Tongue Lab., Inc. v. University of Illinois Foundation.*, 402 U.S. 313 (1971).

To date, the various defendants, including the attorneys now respondents, have not submitted a responsive pleading on the fraud issue. Instead they merely assert repeatedly without support that there was such a full and fair opportunity in *Austin I.* Since the respondents have over and over and erroneously placed this issue as a defense before the courts, petitioner submitted a summary judgment motion subsequent to his complaint in *Austin IV* that proves otherwise (Appendix No. 10). The motion contains 13 material facts supported by evidence that demonstrates conclusively that because of fraud a "full and fair" opportunity could not have taken place in *Austin I.* Among others, the material facts refer to the conspiracy (No.1); falsified GC/MS tests (no.2); concealing a key witness (No. 3); suborning perjury (no.4); forged documentation (no.5); attorney collusion in the falsification of evidence (No.6); concealment of evidence (No.7); verbal misrepresentation by the attorney to the trial court (No.8); changing a venue through fraud (No.9); violation of obligations as officers of the court, including Vermont Attorney Oath (No 11), etc.

## REASONS FOR GRANTING THE WRIT

**1. This dispute has been prolonged for several years by the erroneous interpretation by the courts of two, key legal concepts - "validity" (evidence) and "privies."**

In the *Daubert* case, the Supreme Court replaced the long-standing Frye "general acceptance" standard with an analytical approach emphasizing the scientific method. As the Court stated:

> - ("...[the inquiry] entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid.. Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge ...will be whether it can be (and has been) tested...") *Daubert,* 125 L.Ed.469, 482.
>
> ("...scientists typically distinguish between 'validity' (does the principle support what it purports to show?) and 'reliability' (does application of the principle produce consistent results?).... our reference here is to *evidentiary* reliability - that is, trustworthiness... In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity.*") at p.481, fn.9.

In the *Daubert* decision, the Supreme Court does not formally require that the possibility of fraud be eliminated in order to establish the validity of proffered evidence. Both the district and appellate courts in *Austin III and IV* base their decisions on a contrary interpretation. However, the question of whether or not evidence is valid (ie. rests on ("good grounds") - *Daubert* at 481) can be approached

in a variety of ways without actually considering whether it is a fraud. Furthermore, such a determination can only be made on the basis of the information that is available at that time. During the trial in *Austin I,* petitioner scrutinized the fire investigation and tests by questioning the professionalism and competency of the experts who produced the evidence.

Expert witness fraud, particularly scientific, is insidious. The purpose of *Daubert* would be thwarted if the possibility of fraud is permanently foreclosed by an initial determination of validity on any relevant grounds. Thus the injured party would be prevented unfairly from subsequently utilizing late-discovered evidence of fraud.

The impact of the erroneous interpretation of what constitutes "valid" evidence as applied to the facts of this case has been compounded repeatedly by the mistaken notion that the respondents/attorneys are "privies" with their former insurer client. Note again the Second Circuit's recent statement in error : ("...his [ie. Austin's] allegations that the defendants-appellees or their privies conspired to defraud him..") p.2, fn.1. While "privity" is an amorphous concept, it has a distinct meaning that does not apply to the attorneys/ defendants involved in the instant case. Typically the term indicates parties with shared legal interests, especially those connected to property. For instance, a non-party who succeeds to a party's interest in property is a privy. *Golden State Bottling Co. v. NLRB,* 414 US 168, 179 (1973). Or, those who share water rights previously litigated (Orr-Ditch Litigation) *Nevada v. United States* 463 US 110 (1983). As stated in *Moore's Federal Practice* 3d: "The term privity signifies that the relationship between two or

more persons is such that a judgment involving one of them may justly be conclusive on the others, although those others were not party to the lawsuit." (*Gill & Duffus Serv., Inc. v. Nural Islam,* 675 F.2d 404, 405 (D.C. Cir. 1982) - 132.04[1][b][ii]. Also, ("interests cannot be disassociated from each other...") (*NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 35 (1st. Cir. 1987) ) 132.04 [1][b][iii], fn.18. In sum, during this litigation the combined misinterpretation of these two, significant legal terms (privity and the "validity" of evidence) became a potent mix, resulting in a flagrant fraud in effect becoming its own protection, especially for the attorneys who were so determined to undermine the judicial process.

**2. The misapplication of res judicata and collateral estoppel violates Due Process.**

Because of various legal errors, including the two just discussed, preclusive principles have been misapplied, and a well-supported case thwarted repeatedly along with petitioner's right of Due Process. Collateral estoppel, or "issue preclusion," only blocks an action if it is clearly established by the record that the issue was previously litigated "fully and fairly." In its erroneous order (*Austin III*), the district court cites *United States v. Hussein,* 178 F.3d 125, 129 (2d.Cir.-1999) and the standards contained therein that justify the use of collateral estoppel: 1) the issues in both proceedings are identical; 2) the issue in the prior proceeding was litigated and decided; 3) there was a full and fair opportunity to litigate in the prior proceeding (emphasis added); 4) the issue previously litigated was necessary to support a valid and final judgment on the merits.

In *Blonder-Tongue Labs. v. University Foundation,*

402 US 313, 28 L. Ed.2d 788, 800 (1971), the Supreme Court emphasized that collateral estoppel violates Due Process where a party has ("never had a chance to present their evidence...due process prohibits estopping them."); also *Montana v. United States*, 440 US 147, 164, 59 L.Ed.2d 210, 223, fn. 11 (1979), which emphasizes ("the quality, extensiveness, or fairness of procedures followed in prior litigation.")

In *Austin I* a trial on the merits never occurred because of the attorney's determined campaign to undermine the judicial process. The dismissals in *Austin II, III* and *IV* occurred on the basis of an incorrect interpretation of what took place before the jury abetted by an erroneous interpretation of what constitutes "valid" evidence as well as "privity." As the Supreme Court stated in *Sea-Land v. Gaudet*, 414 U.S. 573, 593, 39 L.Ed.2d 9 (1974) - ("The judgment in the prior action operates as an estoppel... only as to those matters in issue or points controverted..."); also *Commissioner v. Sunnen*, 333 U.S. 591, 597-8, 92 L.Ed. 898 (1948) - those matters actually litigated as long as fraud is not involved.

**3. A fraud regarding scientific evidence also constitutes a "fraud on the court".**

Over the years a variety of deceptions were perpetrated by the attorneys against the federal court system. To gain admission of phony scientific evidence, an attorney must of necessity deceive the trial judge, who functions as the primary gatekeeper for the admission of such evidence. This stage of the fraud is indispensable and in many respects more difficult than tricking a lay jury. Thus expert witness fraud such as this can under appropriate circumstances be regarded as a distinct species of "fraud on

the court."

The activities of the attorneys and experts in *Austin I* constitute a fraud on the court according to any currently recognized definition of the term. In the 1946 revised version of Rule 60b, relief for the first time was provided from a judgment on the grounds of such fraud. *Hazel-Atlas Glass v. Hartford-Empire*, 322 US 238, 88 L.Ed.1250 (1944). However, the advisory committee did not specifically define the concept.

Such fraud has been variously described: ("...fraud [that] harms the integrity of the judicial process.") - *In Re Intermagnetics America*, 926 F.2d 912, 917 (9th.Cir.-1991) emphasis added; or fraud ("...directed to the judicial machinery...") - *Bulloch v. United States,* 721 F.2d 713, 718 (10th.Cir.-1983) emphasis added. The circuits have often dealt with the issue by copying the Hazel-Atlas model to one degree or another. Typically a well-planned "scheme" to defraud is involved:

> ("In Hazel-Atlas the Supreme Court set aside a twelve-year old judgment on account of new evidence of a 'deliberately planned and carefully executed scheme to defraud not only the Patent Office but a Circuit Court of Appeals' in order to obtain a patent. 322 US at 245-6...Proof of a scheme to defraud together with the complicity of the offending party's lawyers in Hazel-Atlas was, in the Court's judgment, conclusive evidence of fraud on the court.") *Gleason v. Jandruko,* 860 F.2d 556, 559 (2d.Cir.-1988).

**4. This dispute involves issues of broad significance, including the ongoing integrity of the nationwide system of homeowners insurance.**

The conspiracy at issue here includes a nationwide insurer (Hanover), fire investigation firm, testing lab, various attorneys and others, all of whom colluded for years to thwart a valid insurance claim and save the insurer a significant amount of money. On the basis of what has been uncovered here, it is unlikely this is an isolated episode. While the situation may be somewhat extreme, the facts indicate that the abuse of expert evidence in regard to homeowners claims is probably more widespread than is thought. Regrettably, the facts of the case demonstrate how easily the science relevant to many claims, especially fire insurance, can be falsified, and a policy voided unfairly. Thus, a policyholder damaged significantly by a casualty is victimized a second time. Under typical circumstances, the fraudulent tests by the Mercury Lab would have provided the requisite, scientific support for the contrived fire investigation. Thus, the precision of the scientific method emphasized in *Daubert* is transformed by fraud into a two-edged sword. Instead of providing a reassuring certainty, the relevant science becomes the efficient means of perpetrating deception and obtaining an unlawful judgment. If the unexpected change in George Wilson's schedule hadn't occurred, the fraudulent nature of the insurer's investigation probably never would have been uncovered.

## CONCLUSION

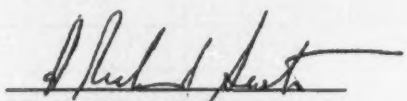
For almost 15 years, petitioner has been trying to overcome this conspiracy that was also directed at the federal court system. Having shielded through fraud their prominent insurer client from financial liability, however, respondents/ attorneys made themselves liable for the harm caused by their actions.

The dispute warrants the Supreme Court's attention for a number of reasons, including the fact that significant judicial errors are involved, which impact directly Rule 60(b) and Due Process itself. In addition, the matter should not be left in its current state. If this petition fails, respondents' fraud, including that visited upon the court, will stand along with all the regrettable consequences for petitioner. Furthermore, it will do nothing less than convince other dishonest experts and attorneys that such highly profitable fraud will succeed, even if mistakes occur along the way.

In conclusion, petitioner seeks the reversal of the dismissal in the court below and the granting of his meritorious summary judgment motion. The motion proves conclusively that respondents engaged in flagrant fraud in *Austin I* and since then have deliberately misrepresented the situation by alleging falsely a full and fair opportunity, thus needlessly prolonging the dispute. An award of the liquidated compensatory damages pursuant to the homeowners policy is also sought- currently $1,864,202. (For the method of calculating this sum see complaint - pgs.32-4). In addition, the request is made that the case be returned to the district court where additional damages can be sought as permitted by Vermont law, including the intentional infliction of emotional pain

and suffering (*Sheltra v. Smith,* 392 A.2d 431, 433 (Vermont, 1978) and punitive damages (*Sparrow Admr. v. Vermont Savings Bank*, 95 Vt. 29, 33 (1921).

Respectfully submitted,



H. Richard Austin
P.O. Box 220814
Kirkwood, MO. 63122
314-849-4827

April 17, 2008

(As previously stated, key points in the various orders are given emphasis with bold type.)

## APPENDIX No.1

### OATH OF ADMISSION TO THE BAR OF THE SUPREME COURT (VERMONT)

**You do solemnly swear/affirm that you will do no falsehood, nor consent that any be done in court, and if you know of any, you will give knowledge thereof to the judges of the court or some of them, that it may be reformed; that you will not wittingly, willingly or knowingly promote, sue or procure to be sued, any false or unlawful suit, or give aid or consent to the same; that you will delay no person for lucre or malice, but will act in the office of attorney within the court, according to your best learning and discretion, with all good fidelity as well to the court as to your client. So help you God/Under the pains and penalties of perjury.**

**You do solemnly swear/affirm that you will be true and faithful to the State of Vermont, and that you will not, directly or indirectly, do any act or thing injurious to the Constitution or Government thereof. So help you God/Under the pains and penalties of perjury.**

**You do solemnly swear/affirm that you will be true and faithful to the United States of America and that you will not, directly or indirectly, do any act or thing injurious to the Constitution or Government thereof. So help you God/Under the pains and penalties of perjury.**

# APPENDIX No.2

United States Court of Appeals
for the
Second Circuit

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No. 99-9375

At a stated Term of the United States Court of Appeals for the Second Circuit at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of May two thousand,

Present:

Hon. Thomas J. Meskill,
Hon. Jose A. Cabranes,
Hon. Robert A. Katzmann,
*Circuit Judges*

May 4, 2000. Decided

Richard Austin,
Plaintiff-Appellant,

v.

Hanover Insurance Company et al.,
Defendants-Appellees

Motions have been filed by appellant, pro se, for a "reducton of excessive bond for costs," and by appellees for a motion to dismiss based on Appellant's failure to post the bond. Upon due consideration, it is ORDERED that the appellees' motion to dismiss is granted on the alternative basis that the appeal is frivolous for being barred by the doctrine of res judicata. See *Pillay v. I.N.S.*, 45 F.3d 14,17 (2d.Cir 1995) (this Court has the inherent authority to dismiss frivolous fee-paid appeals); *In re Teletronics Services, Inc.*, 762 F.2d 185, 190 (2d.Cir. 1985)(discussing the doctrine of res judicata). Appellant's motion is denied as moot.

# APPENDIX No.3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
00-9521

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of July, two thousand and one.

PRESENT: HON. DENNIS JACOBS,
HON. FRED I. PARKER,
HON. SONIA SOTOMAYOR,
Circuit Judges.

July 13, 2001. Decided.

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RICHARD AUSTIN,
Plaintiff-appellant,
v.

HANOVER INSURANCE COMPANY,
MASSACHUSETTS BAY INSURANCE COMPANY,
Defendants-appellees.

APPEARING FOR APPELLANT:
Richard Austin, pro se
Kirkwood, MO

APPEARING FOR APPELLEE:
Gregory S. Clayton, Aten, Clayton & Eaton, PLLC,
Littleton, NH.

Appeal from the United States District court for

the District of Vermont (Murtha, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the United States District Court for the District of Vermont be, and it hereby is, AFFIRMED.

In August 1997, a jury rejected H. Richard Austin's claim for fire insurance. The defendants, insurance companies, presented evidence at trial that Austin had set fire to his own house. Austin's direct appeal to this Court was unsuccessful, and we dismissed his subsequent appeal brought under Fed. R. Civ. P. 60(b) on res judicata grounds. In this, his third trip to this court, Austin appeals from the district court's order denying his motions "to vacate fraudulent judgment and enter judgment with damages for plaintiff," pursuant to Rule 60(b)'s independent action savings clause and "for relief from order granting dismissal," pursuant to Rule 60(b)(2) and (3).

Austin re-alleges his previous claims that the insurers engaged in "premeditated" fraud and committed fraud upon the court by conducting a bogus investigation, altering test results, and submitting false evidence to the court. Specifically, he argues that:
1) he has demonstrated "fraud upon the court" and therefore the judgment against him should not be enforced; 2) res judicata was inapplicable to his case since "different facts are now before the court: and the judgment against him was not on the merits since the defendants fraudulently withheld information from the jury; 3) the defendant insurers conceded fraud by failing to file a brief in response to Austin's petition for certiorari and are therefore estopped from denying it; 4) the defendants' motion to dismiss his **first Rule 60(b) motion** was submitted in bad faith since they failed to

prove lack of fraud and incorrectly claimed that Austin had presented his claims of fraud at trial and in post-trial motions; and 5) the law of the case doctrine does not bar this Court from reconsidering its earlier decision -- to dismiss his appeal from **his first Rule 60(b) motion** as frivolous -- particularly since this Court lacked the benefit of briefing on the res judicata issue. He seeks relief from the initial judgment, an award of monetary damages, and "reinstatement of claims for emotional suffering and punitive damages."

We review a district court's order granting or denying a motion for relief from a final judgment pursuant to Fed. R.Civ.P. 60(b) **for abuse of discretion**. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 719 (2d.Cir. 1998). The district court did not abuse its discretion in denying the Rule 60(b) motions, because Austin **failed to show newly discovered evidence, fraud** or any other reason justifying relief under Rule 60(b). Austin's claim that the defendants waived any claims that they did not engage in fraudulent conduct when they failed to submit a brief to the Supreme court is meritless. See Sup. Ct. R. 15(1) and (2). Austin's claims of fraud are barred by res judicata as those claims were and could have been raised in the trial court or on direct appeal to this Court. See St. Pierre v. Dyer, 208 F.3d 394, 399 (2d. Cir.2000). And to the extent Austin challenges this court's dismissal of his appeal from the denial of **first Rule 60(b) motion**, we find no "cogent or compelling reasons" to disturb our dismissal of his prior appeal. Rezzonico v. H&R Block, Inc., 182 F. 3d 144, 149 (2d.Cir. 1999)(citation omitted).

We have considered all of Austin's other arguments, and we find them to be without merit.

FOR THE COURT:
Roseann B. MacKechnie, Clerk

# APPENDIX No. 4

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT
No. 03-CV-204

H. RICHARD AUSTIN, Plaintiff

v.

DOWNS, RACHLIN & MARTIN, HAROLD EATON, GREGORY CLAYTON, DOUGLAS G. PETERSON & ASSOC., STEPHEN HOUGHTON, and JIMMY PAU, Defendants

November 3, 2003, Decided

J. Garvan Murtha, District Judge

RULING ON DEFENDANTS' MOTIONS TO DISMISS

(Papers 17, 18, 19, and 20)

Plaintiff, H. Richard Austin, filed suit alleging that Defendants engaged in a conspiracy to defraud Plaintiff and this Court by fabricating scientific evidence in relation to Plaintiff's prior unsuccessful lawsuit. Defendants have filed separate Motions to Dismiss under Fed.R.Civ.P. 12(b)(6).

BACKGROUND

To put this case in context, one must go back to 1994 when Plaintiff filed his first lawsuit in this Court, *Austin v. The Hanover Insurance Company, et al*, Docket No. 95-cv-170, seeking insurance proceeds from Hanover after a fire destroyed his home (*Austin I*). Specifically listed on Plaintiff's Trial Memorandum as an issue for trial was the validity of Hanover's scientific evidence.

The case was tried to a jury, which ultimately decided that Hanover did not wrongfully deny insurance coverage to Plaintiff because the fire was caused by

arson. Plaintiff appealed to the U.S. Court of Appeals for the Second Circuit which affirmed the judgment of the District Court. See Austin v. Hanover Ins. Co., 165 F.3d (2d Cir. 1998).

On September 2, 1999, Plaintiff filed a second action, Docket No. 99-cv-252, styled as a petition for relief from judgment (*Austin II*). In *Austin II*, Plaintiff alleged that Hanover engaged in a scheme to defraud by fabricating scientific evidence. The Court dismissed *Austin II*, ruling it was "clearly barred by res judicata." Once again Plaintiff appealed to the Second Circuit which affirmed in an unpublished mandate. See Austin v. Hanover Ins. Co., 14 F. Appx. 109, 110 (2d. Cir. 2001).

Now before the Court is Plaintiff's third attempt: a lawsuit against Defendants, all of whom were either attorneys or experts for Hanover. **The issue is the same** as that raised in the Trial Memorandum of *Austin I*, namely **the validity of scientific evidence** Hanover used to prove arson. In this third attempt, Plaintiff alleges that the attorneys and experts engaged in a conspiracy with Hanover to fabricate the scientific evidence.

Defendants have filed separate Motions to Dismiss arguing that the action is barred by res judicata and collateral estoppel. The Court agrees.

DISCUSSION

In deciding a Rule 12(b)(6) motion, a court must accept as true all of the allegations contained in the plaintiff's complaint and draw all reasonable inferences in his favor. See Burnette v. Carothers, 192 F. 3d 52, 56 (2d. Cir. 1999), cert. denied, 531 U.S. 1052 (2000). The complaint should not be dismissed unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. Id. When considering a motion to dismiss a pro se

complaint, courts must construe the complaint liberally, Cruz v. Gomez, 202 F.3d 593, 597 (2d. Cir. 2000). Nonetheless, upon a review of the Complaint, it is clear that the doctrines of res judicata and collateral estoppel mandate dismissal of Plaintiff's suit.

I. Res Judicata or Claim Preclusion

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Flaherty v. Lang, 199 F.3d 607, 612 (2d Cir. 1999). Courts have recognized that defendants who were not parties to earlier litigation may still invoke the doctrine of res judicata to bar relitigation of claims that a plaintiff asserted in prior proceedings resolved in a final judgment. See Nevada v. United States, 463 U.S. 110, 143 (1983). Here, Plaintiff raised the exact same fraud claim in prior proceedings which were resolved in a final judgment, and now **he attempts to raise this same claim by substituting new defendants.** Plaintiff cannot relitigate the same claim merely by substituting new, different defendants, **in this case the attorneys** and experts affiliated with the party he unsuccessfully sued in Austin I.

II. Collateral Estoppel or Issue Preclusion

Nonmutual collateral estoppel requires that the prior adverse decision bar Plaintiff from relitigating the previously decided issue against new defendants. See Blonder-Tongue Labs., Inc. v. Univer. of Ill. Found., 402 U.S. 313, 350 (1971). The Second Circuit enunciated a four-factor test for applying collateral estoppel:

1. the issues in both proceedings are identical;

2. the issue in the prior proceeding was litigated and decided;

3. there was a full and fair opportunity to litigate in the prior proceeding; and

4. the issue previously litigated was necessary to support a valid and final judgment on the merits. United States v. Hussein, 178 F.3d 125, 129 (2d Cir. 1999).

Each factor appears to be met in this case: **In *Austin I*, Plaintiff raised the issue of the validity of the scientific evidence used by Hanover; Plaintiff did not convince the fact-finder that the evidence was fabricated; he had ample opportunity to litigate the issue in *Austin I*; and the conclusion that the evidence was not fabricated was essential for finding in favor of Hanover**. Thus, collateral estoppel prohibits Plaintiff from rechallenging the validity of scientific evidence that he challenged in *Austin I*.

CONCLUSION

For the reasons discussed herein, Defendants' Motions to Dismiss the Amended Complaint are GRANTED. SO ORDERED.

S/ J. Garvan Murtha, U.S. District Judge

## APPENDIX No.5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 03-9264

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 4th day of November, Two thousand and four.

PRESENT:

HON. RALPH K. WINTER,
HON. ROBERT A. KATZMANN,
HON. REENA RAGGI,
*Circuit Judges.*

November 4, 2004, Decided.

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H. RICHARD AUSTIN, *Plaintiff-Appellant*

v.

DOWNS, RACHLIN & MARTIN, Burlington, Vermont, HAROLD EATON, Eaton & Hayes, Woodstock, Vermont, GREGORY CLAYTON, Aten, Clayton & Eaton, Littleton , New Hampshire (formerly of Downs, Rachlin & Martin), DOUGLAS G. PETERSON & ASSOCIATES, Greenfield, Massachusetts, STEPHEN HOUGHTON, Douglas G. Peterson & Associates, Greenfield, Massachusetts, JIMMY PAU, Mercury Research Laboratory, Cary, North Carolina, *Defendants-Appellees.*

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Appearing for Appellant:
H. RICHARD AUSTIN, pro se, Kirkwood, Missouri
Appearing for Appellee Downs, Rachlin:
ROBERT B. HEMLEY, Esq.,
Gravel & Shea, Burlington, VT
Appearing for Appellee Harold Eaton:
ALLAN R. KEYES, Esq.,
Ryan Smith & Carbine, Rutland, VT
Appearing for Appellee Douglas Peterson:
SHANNON A. BERTRAND, Esq.,
Reiber, Kenlan, Schwiebert, Hall & Facey, Rutland, VT

Appeal from the United States District Court for the District of Vermont (Murtha, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is AFFIRMED.

H. Richard Austin, *pro se*, appeals from a judgment of the United States District Court for the District of Vermont (Murtha, J.), dismissing Austin's amended complaint as barred by the doctrines of *res judicata* and collateral estoppel. Familiarity with the facts is assumed. **We need not go further than affirm the judgment of the district court on the basis of collateral estoppel.**

Defendants present the argument that Austin's claims are barred by collateral estoppel. Under the doctrine of collateral estoppel (issue preclusion), a plaintiff is prevented from relitigating in a subsequent proceeding an issue of fact or law that was fully and fairly litigated in a prior proceeding. See *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288 (2d Cir. 2002). This Court has held that federal law on collateral estoppel applies to determine the preclusive effect of a prior

federal judgment. See *Marvel Characters, Inc.* 310 at 286*; Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 42 (2d Cir. 1986). Under federal law, collateral estoppel applies when: "1) the identical issue was raised in a previous proceeding; 2) the issue was actually litigated and decided in the previous proceeding; 3) the party had a full and fair opportunity to litigate the issue; and 4) the resolution of the issue was necessary to support a valid and final judgment on the merits. *Interoceanica Corp. v. Sound Pilots, Inc.* 107 F.3d 86, 91 (2d.Cir. 1997) (internal quotation marks omitted).

Under non-mutual collateral estoppel, if a litigant has had an opportunity to fully and fairly litigate an issue and lost, then third parties unrelated to the original action can bar the litigant from relitigating that same issue in a subsequent suit. See *United States v. Ustica*, 847 F. 2d 42, 49 n.14 (2d.Cir. 1988) See also *ACLI Gov't Sec., Inc. v. Rhoades*, 963 F. 2d 530, 533 (2d Cir. 1992) (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-31 (1979) (the doctrine of mutuality, at least for defensive use of collateral estoppel, no longer applies); *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 313m 328-30 (1971) (strongly suggesting the mutuality requirement is no longer tenable) (parenthetical notations in the original). Accordingly, **the question for this court is whether or not the issues of fraud and the validity of the scientific evidence were actually decided in *Austin v. Hanover Ins. Co.*, 165 F.3d 13 (2d.Cir 1998) (table opinion) ("*Austin I*").**

**There is considerable overlap between the issues previously litigated and resolved in the prior actions and those which Austin attempts to raise in the instant case.** At issue in *Austin I* and in *Austin v. Hanover Ins. Co.*, 14 Fed. Appx. 109 (2d Cir. 2001)(unpublished opinion), was the validity of the

scientific evidence that was present to the jury. **Austin seeks to relitigate the valdity of that evidence by styling the issues as fraud and fabrication of evidence.** Austin has a full and fair opportunity to litigate these issues in *Austin I*, and the jury's determination that the evidence was not fabricated was necessary to support a finding in favor of the insurance companies. Thus, under the doctrine of non-mutual collateral estoppel, Austin was properly precluded from bringing the instant action.

For the foregoing reasons, we hold that the judgment of the district court is hereby AFFIRMED.

FOR THE COURT: Roseann B. MacKechnie, Clerk

## APPENDIX No. 6

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT
No. 06-CV-38

H. Richard Austin,
Plaintiff

v.

Downs, Rachlin & Martin,
Harold Eaton, and Gregory
Clayton

OPINION AND ORDER
(PAPERS 34, 35, 37, 38 AND 43)

Plaintiff H. Richard Austin, proceeding pro se, brings this action claiming that in the course of a previous and unsuccessful lawsuit, the defendants engaged in a conspiracy to fabricate scientific evidence. Austin's complaint is styled as an "independent action" under Fed. R. Civ. P. 60(b). The case was initiated in the United States District Court for the Eastern District of Missouri, and venue was transferred to this Court.

The defendants have each moved to dismiss, arguing that Austin's claims are barred by collateral estoppel and res judicata. Because the issues being raised in this case have arguably been presented, and rejected, in several previous lawsuits, the defendants also seek a protective order barring Austin from making any related filings in the future. For the reasons set forth below, the motions to dismiss and for a protective order are GRANTED.

Factual and Procedural Background

The history of this case dates back to 1994, when Auostin filed his first lawsuit in this Court. See Austin v. The Hanover Insurance Company, et al., Docket No.95-CV-170 (*Austin I*). In that first case, Austin sought insurance proceeds from The Hanover Insurance Company ("Hanover") after a fire destroyed his home in Warren, Vermont. His trial memorandum specifically listed the **validity of Hanover's scientific evidence as an issue for trial.**

The jury in *Austin I* determined that the home had been destroyed by arson, and that insurance coverage was properly denied. Austin appealed to the Second Circuit, which affirmed the judgment. See Austin v. Hanover Ins. Co., 165 F.3d 13 (2d Cir. 1998). On September 2, 1999, Austin filed a second action which, **as in this case was styled as a petition for relief from judgment** (*Austin II*). In *Austin II*, he claimed that Hanover had engaged in fraud by fabricating scientific evidence. The Court dismissed his complaint, ruling that it was barred by res judicata. The Court's ruling was affirmed on appeal. See Austin. v. Hanover Ins. Co., 14 Fed. Appx. 109, 110 (2d Cir. 2001).

On July 28, 2003, Austin filed a third action, this time naming as defendants persons who served in *Austin I* as Hanover's attorneys and experts. See Austin v. Downs, Rachlin & Martin, et al., Docket No. 1:03-CV-204 (Austin III). Those defendants included the same defendants -- Downs, Rachlin & Martin, Harold Eaton, and Gregory Clayton -- named in this case. The claim in *Austin III* was that the attorneys and experts had conspired with Hanover to fabricate scientific evidence. The Court again dismissed the claim, holding that it was barred by res judicata and non mutual collateral estoppel. As in the previous two cases, the Court's judgment was upheld on appeal. See Austin v. Downs, Rachlin & Martin,

114 Fed. Appx. 21 (2d Cir. 2004).

Austin now brings a fourth action, again claiming that the defendants committed fraud with respect to the presentation of scientific evidence in *Austin I*. The case was initially filed in the United States District Court for the Eastern District of Missouri, which subsequently transferred venue to this Court. In granting the defendants' motion for a transfer, the federal court in Missouri determined that

> although this case clearly has no merit, in the interest of expediency, the Court will transfer this case to the District of Vermont so that it can render a final disposition in this matter. The plaintiff has wasted ten years of his life pursuing this lawsuit in various forms. At this point, whether Plaintiff's conspiracy theories may have any basis in reality is immaterial. Plaintiff had his day in Court, and he did not prevail. Plaintiff's repeated attempts to re-litigate his claim is a waste of judicial resources. If Plaintiff brings this or a related cause of action before this Court again, he will be subject to sanctions. (Paper 34-18 at 7).

The defendants have moved to dismiss pursuant to Fed. R. Civ. P. 12 (b)(6) on grounds of res judicata and collateral estoppel. They have also asked the Court to bar Austin from filing any further actions against them arising out of the same facts and occurrences without prior permission from the Court." (Paper 34 at 17; Paper 37 at 4-5)

Discussion

I. Motion to Dismiss Standard

A motion to dismiss should only be granted if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief." Conley v. Gibson, 355 US 41, 45-46 (1957); see Weixel v. Board of Educ. of New York, 287 F.3d 138, 145 (2d Cir. 2002). When deciding a motion to dismiss, courts must accept all factual allegations in the complaint as true, and draw all reasonable inferences in the nonmovant's favor. See Chambers v. Time Warner, Inc., 282 F. 3d. 147, 152 (2d Cir. 2002)) (citing Gregory v. Daly, 243 F. 3d 687, 691 (2d Cir. 2001)). When a plaintiff is proceeding pro se, courts must construe the complaint liberally. See Haines v. Kerner, 404 US 519, 520 (1972); see also Boddie v. Schnieder, 105 F.3d 857, 860 (2d Cir. 1997). Nonetheless, in this case, Austin's claims are clearly barred by the doctrines of res judicata and collateral estoppel.

II. Res Judicata and Collateral Estoppel

The doctrine of res judicata, otherwise known as preclusion, prevents parties from relitigating issues in subsequent litigation that were or could have been litigated in a prior action. See Allen v. McCurry, 449 US 90, 94 (1980). As **the Second Circuit concluded in denying the appeal in *Austin II*, "Austin's claims of fraud are barred by res judicata as those claims were or could have been raised in the trial court or on direct appeal** to this Court." See Austin v. Hanover Ins. Co., 14 Fed. Appx. 109 (2d Cir. 2001). Two litigations later, the Second Circuit's conclusion still applies.

Austin's claims are also barred by collateral estoppel. Collateral estoppel is applicable when "1) the identical issue was raised in a previous proceeding; 2) the issue was actually litigated and decided in the previous proceeding'; 3) the party had a full and fair opportunity to litigate the issue; and 4) the resolution of the issue was necessary to support a valid and final judgment on the merits." Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d 86, 91 (2d Cir. 1997) (internal quotation marks

omitted). In the appeal of *Austin III*, the Second Circuit found that with respect to Austin's claims against Hanover's attorneys and experts, "there is **considerable overlap between the issues previously litigated and resolved** in the prior actions and those which Austin attempts to raise in the instant case." Austin v. Downs, Rachlin & Martin, 114 Fed. Appx. 21 (2d. Cir. 2004). Consequently, the circuit court concluded that "Austin had a full and fair opportunity to litigate these issues in *Austin I*, and **the jury's determination that the evidence was not fabricated was necessary to support a finding in favor of the insurance company.** Thus under the doctrine of non-mutual collateral estoppel, Austin was properly precluded from bringing the instant action." Id. Because both the claim and the parties in this case are essentially identical to those in *Austin III*, Austin's claims are again barred by collateral estoppel.

III. Protective Order

In the face of "multiplicitous" and/or baseless" litigation, "a district court not only may but should protect its ability to carry out its constitutional functions." Safir v. United States Lines Inc., 792 F.2d 19, 23 (2d. Cir. 1986) (quoting Abdullah v. Gatto, 773 F.2d 487, 488 (2d Cir. 1985)). The Second Circuit has instructed district courts to consider the following factors when deciding whether to enjoin the filling of future lawsuits:

1)the litigant's history of litigation and in particular whether it entailed vexatious, harassing or duplicative lawsuits; 2) the litigant's motive in pursuing the litigation, e.g., does the litigant have an objective good faith expectation of prevailing; 3) whether the litigant is represented by counsel; 4) whether the litigant has caused needless expense to other parties or has posed an

unnecessary burden on the courts and their personnel; and 5) whether other sanctions would be adequate to protect the court and other parties. Id. at 24

This is Austin's fourth attempt to challenge the scientific evidence presented in *Austin I*. (In *Austin II* and *Austin III* he characterized his claims as fraud actions, and in *Austin III* sued the same defendants being sued here. As the federal court in Missouri properly stated, Austin has had his day in court, and at this point he is simply wasting judicial resources.

Reviewing the factors cited above, the Court concludes that Austin now has a lengthy history of duplicative lawsuits. Having been denied both by this Court and by the Second Circuit on each occasion, he cannot have an objective good faith expectation of prevailing. The defendants have been forced into court on the same or related claims numerous times in multiple venues, and are now entitled to repose. Accordingly, if Austin wishes to commence an action in this Court in the future, he must file with his proposed complain a motion for leave to file. The motion will be reviewed by this Court, and if it appears that the proposed action is repetitive, meritless, frivolous, malicious, intended to harass or otherwise barred, leave to file will be denied.

Conclusion

For the reasons set forth above, the defendant's motions to dismiss (Papers 34 and 37) are GRANTED. The defendants' motions for a protective order (Papers 35 and 38) are also GRANTED, and Austin's motion for summary judgment (Paper 43), is DENIED as moot.

SO ORDERED.

Dated at Brattleboro, in the District of Vermont, this 24 day of August 2006.

J. Garvan Murtha
United States District Judge

# APPENDIX No.7

## UNITED STATES COURT OF APPEALS
## FOR THE SECOND CIRCUIT

At a stated term in the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 19 day of March, two thousand eight.

PRESENT:

HON. JOHN M. WALKER, JR.,
HON. BARRINGTON D. PARKER,
HON. PETER W. HALL,
Circuit Judges,

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Summary Order. No. 06-4203-cv

H. Richard Austin, St. Louis, Missouri,
Plaintiff-Appellant,

-v-

Downs, Rachlin & Martin
Burlintton, St. Johnsbury, Vermont,
Harold Eaton, Eaton & Hayes
Woodstock, Vermont, Gregory Clayton
Littleton, New Hampshire
Defendants-Appellees

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For Plaintiff-Appellant: H. Richard Austin, pro se, Kirkwood MO.

For Defendants-Appellees
Downs, Rachlin & Martin and Gregory Clayton:

Robert B. Hemley and Megan J. Shafritz,
Gravel and Shea, Burlington, Vermont
For Defendant-Appellee Harold Eaton:
Allan R. Keyes, Ryan Smith & Carbine, Ltd.
Rutland, Vermont

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the District of Vermont (Murtha, J.), it is hereby ORDERED, ADJUDGED, AND DECREED that the district court's judgment is AFFIRMED.

Pro Se Plaintiff-appellant H. Richard Austin ("Austin"), a frequent litigator before this Court[1] , appeals the district court's
August 25, 2006 judgment dismissing the action based on the doctrines of res judicata and collateral estoppel. We assume the parties' familiarity with the underlying facts and procedural history of the case.

We review the district court's grant of a motion to

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[1] This appeal marks **the fifth time** that Austin has appealed to this Court a denial of claims related to his allegations that the **defendants-appellees or their privies** conspired to defraud him and the federal courts by fabricating evidences to the origin of the fire that destroyed his Vermont home in 1993. See *Austin v. Hanover Ins. Co.*, No. 95 Civ. 170 (JGM)(D.Vt. Aug.1, 1997), aff'd, 165 F.3d 13 (Table) (2d. Cir.1998), cert. denied, 527 US 1004 (1999) (affirming judgment against Austin in first lawsuit; *Austin v. Hanover Ins. Co.*, No. 99-9375 (2d. Cir. May 4, 2000), dismissing appeal from No. 99 Civ. 252 (JGM) (D. Vt. Nov.3, 1999) dismissing second lawsuit); *Austin v. Hanover Ins. Co.*, No. 99 Civ.252 (JGM) (D.Vt. Nov.7,2000) aff'd, 14 F. Appx 109 (2d Cir. 2001) (affirming denial of subsequent appeals from dismissal of second lawsuit, cert. denied 534 US 954 (2001): *Austin v. Downs, Rachlin & Martin*, No. 03 Civ. 204 (JGM)(D.Vt. Nov. 3, 2003), aff'd 114 F. Appx 21 (2d Cir. 2004)(affirming dismissal of third lawsuit, cert. denied 544 US 961 (2005).

dismiss de novo, accepting the plaintiff's factual allegations as true and drawing all reasonable inferences in favor of the plaintiff. *Mason v. Am. Tobacco Co.*, 346 F.3d 36, 39 (2d.Cir. 2003); cf. *Boguslavsky* v. *S. Richmond Sec., Inc.*, 225 F.3d. 127, 129-130 (2d.Cir. 2000) (reviewing de novo district court's application of res judicata); *Chartier v. Marlin Mgmt., LLC*, 202 F.3d 89, 93 (2d Cir.2000) (reviewing de novo district court's application of collateral estoppel). When a defendant raises the affirmative defense of res judicata or collateral estoppel "and it is clear from the face of the complaint...that the plaintiff's claims are barred as a matter of law," dismissal under Fed. R. Civ. P. 12(b)(6) is appropriate. *Conopco, Inc. v. Roll Int'l.*, 231 F.3d 82, 86-87 (2d Cir.2000). Furthermore, "the party asserting preclusion bears the burden of showing with clarity and certain what was determined by the prior judgment." *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 677 (2d. Cir. 1997) (internal quotation marks omitted).

Under the doctine of res judicata (claim preclusion), "[a] final judgment on the merits of an action precludes the **parties or their privies** from relitigating issues that were or could have been raised in that action," *Federated Dept Stores, Inc. v. Moitie*, 452 US 394, 398 (1981), and constitutes an absolute bar "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose," *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1463 (2d. Cir. 1996) (internal quotation marks omitted). Res judicata therefore bars the subsequent litigation of any claims arising from the transaction or series of transactions that was the subject of the prior suit. See *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F. 3d 86,90 (2d Cir.1997).

Under the doctrine of collateral estoppel (issue preclusion), a plaintiff is prevented from "relitigating in a subsequent action an issue of fact or law that was fully and fairly litigated in a prior proceeding." *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288 (2d Cir.2002). Federal law applies to determine the preclusive effect of a prior federal judgment. Id. at 286.Under federal law, collateral estoppel applies when:"1) the identical issue was raised in a previous proceeding; 2) the issue was actually litigated and decided in the previous proceeding; 3)the party had a full and fair opportunity to litigate the issue; and 4) the resolution of the issue was necessary to support a valid and final judgment on the merits."
107 F.3d at 91 (internal quotation marks omitted).

Under non-mutual collateral estoppel, if a litigant has had an opportunity to fully and fairly litigate an issue and lost, then third parties unrelated to the original action can bar the litigant from relitigating the same issue in a subsequent suit. See *United States v. Ustica*, 847 F.2d 42, 49, n.14 (2d.Cir.1988). In this case, Austin's fourth complaint was properly dismissed for the reasons set forth in the district court's thorough and well-reasoned opinion. Moreover, as the district court acknowledged, Austin has already appealed these issues several times to this Court, which determined that the district court's findings were correct and Austin's arguments were without merit.

Defendants-appellees Downs, Rachlin & Martin and Gregory Clayton request that they be awarded their costs in defending against this appeal. While we deny the request, Austin is placed on notice that future frivolous or vexatious litigation will expose him to the imposition of penalties, such as monetary sanctions and filing injunctions. See Fed. R. App. P. 38 (authorizing

imposition of damages for filing a frivolous appeal); see also *In re Martin-Trigona*, 9 F.3d 226, 227-229 (2d Cir.1993)(discussing various sanctions courts may impose upon vexatious litigants).

Accordingly, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan

Wolfe, Clerk

# APPENDIX No. 8

Excerpts from the sworn statement of
Mr. Jay Chrystal, Milford, New Hampshire

JAY CHRYSTAL

having been first duly sworn, was examined and testified as follows:

EXAMINATION

Q. (By Mr. Austin): Mr. Chrystal, how many years of experience do you have in the field of laboratory testing?
A. I started working in environmental testing in October of 1983, so that would put me at about 18 years this October.
Q. You are the owner and laboratory manager of ChemServe?
A. Yes, I am the owner, President and the Laboratory Director.
Q. What type of testing work do you perform at ChemServe?
A. We are a full-service environmental testing laboratory, so we offer organic environmental analyses, inorganic environmental analyses, bacteriological wet chemistry, so the whole gamut aside from radiologicals.
Q. Who certifies ChemServe to do this analytical testing.
A. We are in both certification programs and accreditation programs. One of the more flagship accreditation programs that we are currently in is the NELAC Program, which is the National Environmental Laboratory Accreditation Program. That is monitored. One of the accrediting authorities is the State of New Hampshire's Department of Environmental Services. So we are accredited through them, but we are also certified through all of the New England states.
Q. The National Environmental Laboratory Accreditation Conference, that is a program under the National

Environmental Lab Accreditation Program?
A. Yes.....
Q. Specifically referring to the Hewlitt Packard chromatograph mass spectrometers or GCMS's, as they generally are referred to, how many years have you worked with Hewlitt Packard GCMS's?
A. I installed my first Hewlitt Packard GCMS in April of 1988, and I have been working with them ever since.
Q. So 1988 to the present time, so roughly 13 years?
A. Yes.
Q. Now the GCMS includes the testing instrument or mass spectrometer and the data or computer system to which it is connected. Can you explain how those two components interact, including the role of the software?
A. The GCMS is comprised of a gas chromatograph and a mass spectrometer, which is the actual instrumentation that will acquire the data. This system is generally hooked up to some sort of computerized system that it gets all of its operating function from. So the computer is set up with software that is specifically designed to run the GC and the mass spectrometer, and it also is designed to acquire the data as the instrument is running. The software generally is something that is purchased to match up with the GCMS system that you are running, so if you are running a Hewlitt Packard system you will purchase Hewlitt Packard's software to run that system. It is an integrated system, where one does not run without the other.
Q. So I guess we can call the computer the brains of the operation.
A. Sure, in layman's terms that would work.
Q. Now, we have two exhibits, which are tests reports performed on a Hewlitt Packard GCMS. Exhibit A is dated November 25th 1993 hyphen 2:32 a.m. And Exhibit B. November 25th 1993 hyphen 4:00 a.m.

A. Correct.
Q. Do you have those Exhibits in front of you?
A. Yes, I do.
Q. Now, could you explain how the dates and times that I referred to were produced? In other words where did they originate from?
A. Those dates and times are what are called the acquisition time. The acquisition time is when the GCMS system specifically started running that particular sample. The place where it gets the time from the real-time clock, which is on the mother board of the computer. So the software is basically signifying that it is time to start running the sample. It looks at the real-time clock on the mother board of the computer and stamps that time into the codes of the actual acquisition file.
Q. To speak more specifically about this internal clock, that clock is supported by a battery; is that correct?
A. That is correct.
Q. So the clock runs continuously 24 hours a day, 7 days a week; correct?
A. Correct.
Q. And this CMOS battery supports the clock even if the computer is turned off; is that right?
A. Yes, it is designed as a fairly reliable battery to keep the clock running in real-time in the background regardless of whether the computer itself is powered down or completely shut off.
Q. Now, these batteries are typically lithium, and they are capable of lasting for years; is that correct?
A. I believe an estimated lifetime for most CMOS batteries is up to ten years.
Q. What else does the battery sustain in addition to the clock?
A. It sustains all of the bios-settings for the computer itself. So, when a computer needs to go to the bios-

settings to know what type of hard drive it has, and what type of other firmware and hardware has been configured for that particular computer. Without the CMOS, or if the CMOS battery were to be taken from the computer, then all those settings would be lost, and the computer would have to be reconfigured upon start-up.

Q. Now, looking again at Exhibit A and B, is it correct that these tests were performed on a H.P. Micro-Computer utilizing pascal software?

A. It looks to me that both of them have the distinctive integration of a pascal system. So if you look at the Exhibits, you will see that each peak has numbers at the top of it, many of them actually covering other numbers, so most of them are unreadable. This is fairly unique to the pascal system.

Q. So, in other words, the various characteristics that you have seen with pascal printouts, those are present here to you?

A. Yes.

Q. Now, at ChemServe you worked with Hewlitt Packard GCMS's employing pascal software for a number of years, so would it be correct to say that you are familiar with pascal?

A. Yes. I am familiar with pascal.

Q. Because you actually worked with the pascal system?

A. Yes. We worked with a pascal system from when we first purchased our first GCMS system in 1988 until we upgraded to a DOS base system, which was in 1991, 1992.

Q. So that was a very substantial period of time that you worked roughly everyday with the pascal system?

A. Yes, at least on a weekly basis.

Q. Now, referring again to the internal clock that is supported by the battery, I think we have concluded that it is not necessary to set the date and time every time a

GCMS, including its computer, is turned on, in that it had been previously turned off?
A. It is not necessary to set that clock. It will come up whatever real-time it has calculated in the background every time you turn the computer on, and it will continue to operate much like a regular watch will operate even when you are utilizing the computer with a clock running in the background.
Q. In other words, the clock continues to run, and even though you turned the machine off, there is a current date and time in there?
A. Correct....
Q. Okay. Now, if a statement has been made that it is necessary every time at the beginning of a test with a H.P. system to set the internal clock, that would be false and contrary to the way that microcomputers are designed and function; is that right?
A. Exactly. You don't generally set the clock at all while you are running it, it will acquire its own date and time from the real-time clock. So that statement is completely contrary to the way that this system works.
Q. Now, regarding Exhibits A and B, wouldn't it be correct that these two dates and times of November 25th 1993, 2:32 a.m., and November 25th 1993, 4:00 a.m., were automatically assigned by the computer and emanated from the continuously running internal clock and would in effect be the date and time when the tests were actually performed?
A. That is correct....
Q. Can you just briefly explain what the auto tune procedure is?
A. In order for the GCMS system to operate and function properly, you have to tune the instrument. One of the ways of initially tuning
the instrument is to utilize the auto tune function, which

is part of the H.P. software. What that does is that automatically goes in and adjusts different electrical functions and different pieces of hardware within the mass spectrometer to maximize its sensitivity., Once that auto tune is performed you would save that tune file, and that would be utilized when you are acquiring any data. You would place that tune file in your actual method, so when the computer and the GCMS system started running a sample the first thing it would do is go and set up these operating conditions that maximize the sensitivity through auto tune to keep that instrument within a tune.

Q. So, in other words, you would have had the computer on to perform the auto tune function?

A. Absolutely.....

CERTIFICATE

I, Carolann Crowley, a Certified Shorthand Reporter and Notary Public of the Commonwealth of Massachusetts, do hereby certify that the foregoing is a true and accurate transcript of my stenotype notes of the deposition of Jay Chrystal....

## APPENDIX No. 9

Excerpts from the sworn statement of
Dr. Donald Hesse, Saint Louis, Missouri

DR. DONALD HESSE

of lawful age, having been first duly sworn to testify the truth, the whole truth, and nothing but the truth in the case aforesaid, deposes and says in reply to oral interrogatories propounded as follows, to-wit:

EXAMINATION

QUESTIONS BY MR. AUSTIN

Q. Dr. Hesse, could you explain what field your Ph.D is in?

A. My Ph.D. is in organic chemistry... I was awarded the Ph.D. in 1990 from the University of Missouri in St. Louis.

Q. You have worked in the field of analytical chemistry and material identification for approximately 19 years?

A. That is correct.

Q. And for 14 years, you worked at various analytical laboratories in the St. Louis area?

A. Yes.

Q. And since approximately 1997, you've had your own consulting firm. Could you explain a little bit about your consulting business?

A. My consulting firm is Veritos Analytical Services, Incorporated...The company specializes in consulting with analytical laboratories analysis...

Q. Now, during this 19-year period, you have worked as both a chemist and at times you've written software for the material identification field?

A. Yes.

Q. And you just alluded to the fact that in addition to having your consulting business, you are the director of information services --

A. Systems, information systems.
Q. Information systems at the St. Louis Post-Dispatch, and just roughly your duties at the Post-Dispatch are what, what do they consist of?
A. I'm in charge of all the business systems at the Post-Dispatch, which include the financial computer systems, circulation management systems and our advertising management systems.
Q. And that goes to computers and to software?
A. Yes.
Q. Okay. Now during the 19 years that you have been involved in the analytical chemistry field, you have worked regularly with Hewlett Packard gas chromatograph/mass spectrometers or GC/MS as they are generally referred to?
A. Yes.
Q. Now, you have also at times written software for some of this Hewlett Packard equipment?
A. Yes, when I was at the first, or when I first started working with the HP GC/MS, I wrote software on the HP chem station, Pascal chem station, for making that analysis, reporting of analysis more efficient. I also wrote software on the other HP GC/MS specs system that we had there.
Q. And currently, as part of your consulting business, you also do software?
A. Yes, yes, I have written one major software application and we have a second one in development, and then I also write custom programs for laboratories.
Q. Now, we have two exhibits as part of this deposition, they are chromatograms of tests produced on Hewlett Packard GC/MS. Exhibit A is dated November 25th, 1993, 2:30 a.m., and the Exhibit B is dated November 25th, 1993, 4:00 a.m.
A. Okay.

Q. And you have those in front of you?
A. One is actually 2:32 a.m., it looks like, but --
Q. 2:32 and 4:00 a.m.?
A. Yes.
Q. All right. Now, is it correct that these two tests were performed on a micro computer GC/MS system utilizing Pascal software?
A. These chromatograms and the reports bear all the resemblances of the standard reports that are produced by the HP Pascal chem station.
Q. In other words, they contain the characteristics that you would see in a --
A. Yes.
Q. -- report generated by Pascal?
A. Yes, they do.
Q. And we have just referred to the fact that for several years you've worked with Hewlett Packard GC/MS equipment that utilized Pascal software?
A. Yes.
Q. And also that you wrote the software for those Pascal systems?
A. Yes, I wrote on the Pascal chem station. I wrote software that produced reports and analyzed results, calculated results, for that system.
Q. Now, could you explain how the date and time, which is on the right-hand side of the reports, was entered by the computer into these two test results, Exhibit A and B, in other words where did the date and time originate?
A. When the instrument is going to start collection on an alga run, it reads the date and time from the computer system clock, and inserts that into the data file for the particular test run, and that time is the second that the sample is injected into the GC.
Q. Okay. So, it automatically takes the date and time from this clock. Now, this clock runs, am I correct, 24

hours a days and thereby maintains a current date and time?
A. Yes, the system, the clock is a running system clock, runs continuously, it is backed up by a battery a C-moss battery, and it is a fully functional computer clock.
Q. Now, because the internal clock is supported by the battery, it is not necessary to set the date and the time every time such a GC/MS
including its computer is turned on in the event it was previously turned off, would that be correct?
A. That's correct, yes. It maintains the time across power turn off.
Q. Okay. Now, the statement that it is necessary every time at the beginning of a test to set the internal clock, wouldn't that be false and contrary to the way such micro computers are designed and functioned?
A. Yes, that would be false. It is not necessary to set the date and time before each analytical test run....
Q. ...Dr. Hesse, based on these two exhibits, you indicated that it was your conclusion that the tests that had been performed on an HP GC/MS using Pascal employed what is called an auto sampler, could you explain how the auto sampler works and how that would relate to the date and time that's inserted in the test results?
A. I'm basing my assumption that an auto sampler was used because there's a bottle number on the analytical report and that bottle number changes between runs, and that indicates that an auto sampler was used on the instrument, and when there's an auto sampler present, the operator of the instrument will set up an analytical sequence using the Pascal chem station software, they would type in all the sample names that they plan on running. They will put those samples in the auto sampler, and they'll start the sequence, and then the computer

system will automatically run all the samples without any further intervention from the analyst. Every time the sample of the instrument makes an analysis, at the moment it injects the sample into the instrument, it reads the system date and time off -- it reads the date and time off the system clock and inserts that into the data file and that's the injection time for this run...

Q. Now, the report that is at 2:32 a.m., that was from bottle --

A. Bottle 5.

Q. So, there would have been presumably four bottles previously?

A. Yes, presumably.

Q. And then the one dated 4:00 a.m. was from Bottle No. 7?

A. Yes.

Q. So then there was one in between there?

A. Yes.

Q. Now, once you stored a run like that on a series of bottles, the computer runs automatically and each time, at the moment the sample is injected, a date and time are obtained automatically from the internal clock?

A. Yes, they're obtained automatically

Q. Okay. And that doesn't require any intervention by the operator of the machine?

A. No. No. No intervention at all....

I, Margaret M. Clodius, a Notary Public in and for the State of Missouri duly commissioned, qualified and authorized to administer oaths and to certify to depositions, do hereby certify that pursuant to Agreement in the civil cause now pending and undetermined in the United States District Court, District of Vermont, to be used in the trial of said cause in said court, I was attended at the offices of Dr. Donald Hesse, County of St. Louis, State of Missouri, by the aforesaid

witness; and by the aforesaid attorneys; on the 23rd day of March, 2002.....said testimony being by me reported in shorthand and caused to be transcribed into typewriting, and that the foregoing pages correctly set forth the testimony of the aforementioned witness, together with the questions propounded by counsel and remarks and objections of counsel thereto, and is in all respects a full, true, correct and complete transcript of the questions propounded and the answers given by said witness....

# APPENDIX No. 10

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

H. RICHARD AUSTIN, NO.1:06-CV-38
Plaintiff Pro Se
v.
DOWNS, RACHLIN & MARTIN,
HAROLD EATON, EATON & HAYES,
GREGORY CLAYTON, ATEN, CLAYTON
& EATON (formerly of DOWNS, RACHLIN
& MARTIN,
Defendants

## MOTION FOR SUMMARY JUDGMENT

Pursuant to FRCP 56, plaintiff moves for summary judgment on the controlling issue of fraud. In addition to the fraud perpetrated against plaintiff, the evidence in the well-developed record also demonstrates that the unlawful scheme involving defendants rises to the level of an ongoing fraud against the federal court system. At this point, Defendants cannot substantiate any material fact that refutes plaintiff's cause of action and the attached "Material Facts Not in Dispute" supporting this motion.

## MEMORANDUM

### 1) Subject Matter

The independent action (FRCP 60b - savings clause), filed on May 19, 2005 in the Eastern District of Missouri, pleads the longstanding conspiracy involving defendants that deprived plaintiff illegally of the benefits of his homeowners policy following a house fire. The focus of the scheme is falsified evidence of fire causaion,

which enabled defendants' insurer client (Hanover) to prove through dishonest means the indispensable element of the so-called arson defense to liability ("must [prove]...that the fire was of incendiary origin." - (*Westchester Fire Insurance Company v. Deuso*, 146 Vt. 424, 426, 505 A.2d 666 (Supreme Court of Vermont (1985)).

To accomplish this disreputable objecive, a fire investigation firm (Douglas G. Peterson & Associates, Greenfield, Massachusetts), hired by the insurer, falsified a "scene examination" report based on falsified gas chromatograph/mass spectrometer (GC/MS) tests. These prearranged tests performed at the Mercury Research Lab in Cary, North Carolina were supposed to provide the "hard" or supporting evidence of arson. In this way the relevant evidentiary standards were nullified. ("Proposed testimony must be supported by appropriate validation - ie., 'good grounds'...the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability.") (*Daubert v. Merrell Dow*, 509 US 579, 125 L.Ed.2d 469, 481 (1993)).

Defendants were indispensable to the scheme, their illegal activities effectively undermining the judicial process on an ongoing basis so the fraud could be executed effectively in court. As previously stated, some of the illegal acts they perpetrated also rise to the level of "fraud on the court" and were directed at the Eastern District of Missouri, District of Vermont and the Second Circuit Court of Appeals.

Among others, the unconscionable methods employed by defendants include: violating their rights and sworn duties as officers of the court to further the unconscionable objectives of the conspiracy (material fact. No.11); engaging in direct misrepresentation and

other deception directed at federal courts - material facts nos. 8 and 9); attorney involvement in the fabrication of false evidence during discovery in order to protect and enhance the scheme (material fact no. 6); signing and certifying various court documents, including discovery responses, that were intended to legitimatize the fraud (material fact. no. 10); concealing a key witness (Jimmy Pau, technical director of the Mercury Research Lab), for several months so he could not be questioned properly about fraudulent evidence (material fact no.3); concealing fraudulent evidence alleged to be material so it could not be scrutinized effectively (material fact no.7); attorney endorsement of forged documentation in order to nullify an important court order regarding the disclosure of information highly relevant to the fraud (material fact no.5); suborning expert witness perjury at trial (material fact no.4), etc.

("Most of the illegal acts...individually, or all of them collectively, prove plaintiff's cause of action." Complaint, Item No. 8 (p.4). In these and other improper ways, the attorneys over a sustained period implemented a course of action that they knew was unethical and illegal. ("All of the defendants/co-conspirators are knowledgeable about the law and were well-aware of the harmful effect of their actions.") Complaint, Item No.7 (p.4). The cumulative result of the attorneys' actions was to make it impossible for plaintiff to assert his legal rights in court. As stated, ("All of these conspirators played a direct and important role in the success of the fraud, and each bears responsibility for any and all of the corrupt acts that were employed to make it a success.") Complaint, Item No.10 (p.6). The evidence substantiating the attorneys' illegal activities is conclusive and for the most part confirmed by their own words and/or documents. At his point, there is more than adequate

grounds for the summary resolution of this matter.

2) Defendants' Motions to Dismiss

Following the transfer of this action from the Eastern District of Missouri, defendants filed pending motions to dismiss (March 2, 2006) that contend the complaint is barred on the grounds of res judicata and collateral estoppel. The motions allege falsely that the fraud issue pleaded in the complaint was supposedly contested before the jury at the trial (August 1997) during the initial proceeding against their insurer client (95-CV-170). Defendants have made this spurious argument before and once again fail to produce any trial transcript that substantiates the allegation. (What transcript they provide merely demonstrates that some generalized questions were asked regarding the fraudulent GC/MS tests in question. However, the fact that these tests are a deliberate fraud was never discussed on inferred before the jury.)

Additionally, the motions to dismiss point to the fact that plaintiff has already attempted unsuccessfully to litigate his cause of action for fraud in this court. This occurred with an independent action against the Hanover Insurance company (99-CV-252) and also an action against the current defendants and others (03-CV-204). However, both actions were not given a chance to proceed and instead were dismissed. As discussed in "Plaintiff's Opposition to Defendants' Motions to Dismiss and for a Protective Order (March 13, 2006) - pgs. 4-10 with attached orders, the dismissals were not supported by proper evidence and the required de novo review of the dismissals never took place at the Second Circuit (99-9375);(00-9521); and (03-9264)) Thus after more than six years, plaintiff is still seeking his proverbial day in court regarding defendants' longstanding fraudulent activities

that unlawfully deprived him of the proceeds of his homeowners policy.

3) Res Judicata and Collateral Estoppel Do Not Apply

The controlling consideration regarding the doctrines of res judicata and collateral estoppel is not whether an issue (such as a fraudulent fire investigation based on fake lab tests) was mentioned or even contested in court. Instead, it is whether there was a "full and fair opportunity" to do so. This key point is discussed in plaintiff's "Opposition" to the motions to dismiss (see pgs. 10-11 with cases cited.) ("...the requirement of determining whether the party...had a full and fair opportunity to litigate is a most significant safeguard...") *Blonder-Tongue Labs. V. University Foundation*, 402 US 313, 329 (1971); and *U.S. v. Hus*sein, 178 F.3d 125, 129 (2d.Cir. 1999).

The complaint and the supporting documentation demonstrates that the "full and fair opportunity" required to assert a res judicata or collateral estoppels defense could not possibly have taken place - a fact totally ignored by defendants in their motions. Also, defendants failed to respond to the "Opposition" and did not contest the discussion therein that emphasizes this salient, legal fact. In essence, the type of systematic fraud practiced by defendants and the required "full and fair opportunity" that enables a party to assert valid, legal rights are mutually exclusive. This issue that is now the focus of the controversy is well-defined, and defendants have put it before the court. Therefore, it is appropriate at this time to file this motion for summary judgment that addresses this issue and settle the dispute on the basis of related material facts not in dispute.

After more than a decade of litigation, the record is well-developed and the evidence supporting these

material fact very strong. As noted, man of the material facts are substantiated by defendant's own words and/or actions. Defendants have possessed this information for years and cannot allege surprise or hardship, especially since they are the source of much of this evidence. Therefore, delaying the matter further, including additional discovery, is not warranted.

4) "Officers of the Court

The subject fraud was perpetrated by attorneys who take an oath and are considered "officers of the court." Nonetheless, they repeatedly and flagrantly abused their obligations pursuant to an oath that requires them not "willingly or knowingly [to] promote, sue or procure to be sued, any false or unlawful suit." Furthermore, they also swore to "do no falsehood, nor consent that any be done in court, and if you know of any, you will give knowledge thereof to the judges of the court or some of them, that it may be reformed." A review of the complaint clearly demonstrates that defendants totally disregarded both aspects of their oath. To conclude that they did not act fraudulently and violate the oath, it would be necessary to disregard the explicit meaning of written records, many signed by them. It is the long-recognized standard in the Second Circuit that an attorney's "loyalty to the court, as an officer thereof, demands integrity and honest dealings with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court." *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d.Cir. 1972). This explicit standard of conduct dictated by the Vermont Supreme Court oath also pertains, of course, to the attorneys representing the defendants.

Damages

The compensatory damages sought in the complaint are based on the insurance contract and the Proofs of Loss accepted by the insurer. As a result, these damages that became due on April 1, 1994, or more than 12 years ago, are liquidated. Updated for applicable prejudgment interest (12%), allowed living expense and other factors, the aggregate amount is currently $1,676,913. (For a detailed discussion of the components of these damages, see the complaint section 41, pgs.32-4) If summary judgment is granted, plaintiff seeks an immediate award of the full amount. And finally, consequential damages (emotional pain and suffering) and punitive damages are also sought as permitted under the standards of the substantive law.

Saint Louis, Missouri May 12, 2006

H. Richard Austin
P.O. Box 220814
Kirkwood, MO 63122
(314)-849-4827

**MATERIAL FACTS NOT IN DISPUTE**

1) Defendants were indispensable participants in a fraudulent scheme that deprived plaintiff illegally of the benefits of his homeowners insurance policy (HVV #2442889) after a house fire. To achieve that dishonest objective, the conspirators ulitized falsified, scientific evidence of arson as well as a variety of dishonest litigation tactics that effectively undermined the judicial process - ie prevented a full and fair opportunity to litigate the matter.

- Evidence: See Material Facts 2-11 and the related evidence cited therein.

2) The fraudulent evidence of arson is focused on falsified gas chromatograph/mass spectrometer (GC/MS) lab tests utilizing material that didn't come from the subject fire site. These falsified GC/MS lab tests were performed at the Mercury Research Lab, Cary, North Carolina on November 25, 1993 (2:32 am and 4:00 am). It is known that the tests are fraudulent because they contain a date/time encrypted in the test results that indicate the tests could not have been performed on whatever materials fire investigator George Wilson (Douglas G. Peterson & Associates, Greenfield Massachusetts) removed from the subject fire site in Warren Vermont on the afternoon of November 24, 1993. (Complaint sections 18,19,20,21,22,23,24,25,26,27,28 - pgs. 14-22).

Evidence:

a) Exhibits to Complaint Nos. 5,6 (pgs. A.7-A.8) - GC/MS tests results. (Note encrypted date/time in lower right side of the chromatograms.)

b) Exhibit No.7 (A.9-A.16) - Trial Testimony of Jimmy Pau, technical director of the Mercury Research Lab. (Note statement by Pau on page 32, lns.24-5 (A.13)).

c) Exhibit No. 11 (A.57-A.59) - Letter from Mercury Research Lab (December 2, 1993) reporting the falsified lab tests to Douglas G. Peterson & Associates.

d) Exhibit No.8 (A.17-35) - Deposition of Mr. Jay Crystal. (The GC/MS dating process is discussed at pgs. 10-12 (A.25-7) and elsewhere)

e) Exhibit No.9 (A.36-A.54) Deposition of Dr. Donald Hesse. (The GC/MS dating process is discussed at pgs. 9-10 (A.42-3) and elsewhere.)

3) The scheme to undermine the judicial process involved concealing a key material witness, Jimmy Pau, technical director of the Mercury Research Lab., who disappeared for several months so he could not be questioned properly during discovery about his falsified lab tests. He did not reappear until discovery was closed. (Complaint section no.30 (pgs.23-24).

Evidence:

a) Exhibit No. 12 (A.60) - Letter from Gregory Clayton (September 18, 1996).

b) Exhibit No. 13 (A.62) - Letter from Gregory Clayton (October 30, 1996). Therein, Clayton provides only the address of the Mercury Lab and not a current address for Pau. These two letters should be read in the context of plaintiff's motion (Docket No.98, p.2) in which he complains to the court regarding his inability to obtain additional information from defendants' experts, including Pau, "through subpoena interrogatory or formal letter.")

4) Having prevented Jimmy Pau's proper examination during discovery, Attorney Gregory Clayton suborned Pau's false testimony at trial (July 31, 1997) in order to deceive the jury regarding the fraudulent tests. (Complaint section no.21 - a,b,c,d (pgs. 16-17).

Evidence:

a) Exhibits listed above in connection with Material Fact No.2, especially a) Pau's statements that deceived the jury regarding the way the GC/MS in question generated the revealing date/time contained in the subject test results.

5) The ongoing effort to conceeal the fraudulent nature of the subject lab tests also included the use of forged documentation attributed to the authoritative

American Society of Testing and Materials. The forgery endorsed in writing by Attorney Claayton, was used to nullify an important court order (October 28, 1996) requiring Jimmy Pau to produce information highly relevant to the falsified lab tests. (Complaint section no.31, pgs. 24-25)

Evidence:

a) Exhibit No. 14 and 15 (A.63,64) - Letter from Gregory Clayton (November 25, 1996) with attachment alleged to come from the ASTM.

b) Exhibit No. 7 (A.9-10) - Pau trial testimony in which he admits that the document produced on November 25, 1996 and falsely attributed to the ASTM is not genuine.

6) During discovery, Attorney Clayton, Stephen Houghton (director of fire investigation services at Douglas G. Peterson & Associates) and Jimmy Pau colluded in the production of two, additional falsified GC/MS lab tests. These additional tests were important to the scheme because they attempted to obscure the falsity of the two, initial GC/MS tests. (Complaint sections nos. 33,34,35,36 (pgs.27-30))

Evidence:

a) Exhibit No. 19 (A.72-3) - Letter from Stephen Houghton (August 20, 1996).

b) Exhibit No. 20 (A.74) - Letter from Mercury Research Lab (June 21, 1996) regarding the test of the substance referred to in Houghton's letter (August 20, 1996). According to this third, spurious test, the substance identified in the two, initial fake tests - that couldn't possibly have come from the subject fire site - supposedly originated from plaintiff's underground fuel tank.

c) Exhibit No. 21 (A.75) - Letter from Mercury

Research Lab (March 6, 1997) regarding the test of an item obtained from Officer David Harrington of the Vermont State Police. Harington claimed to have found this item -a piece of newspaper allegedly containing fuel oil - on plaintiff's property after the fire. Similar to fake test No.3, the spurious conclusion was reached that the substance identified in the initial fake tests was on that newspaper.

7) The effort to generate the fourth, falsified lab test involved concealing during discovery the allegedly valid evidence on which the test was based so this latest addition to the fraud could not be detected. As a result, this last fake test was not disclosed until the case was already on the trial calendar or more than a half year after discovery ended. (Complaint section nos.35, especially (a), 36 (pgs.28-30).

Evidence:

A) Exhibit No. 22 (A.76-8) - Excerpt from the deposition of Officer David Harrington (July 2, 1996). (The complete deposition is in the record at Docket No. 155.) Therein, repeated questions are directed at both Officer Harrington and Attorney Clayton regarding any "physical items" in the possession of the Vermont State Police of which plaintiff is unaware - "so physical items in my possession." p.72, n.12 (A.76). Nonetheless, plaintiff was not informed that supposedly Harrington had the newspaper that ten months later was used to generate the fourth, falsified test.

8) In order to gain admission of this last, fraudulent lab test as well as the substance on which it was based, the court was deliberately deceived by Attorney Clayton at the pretrial conference (July 1, 1997). At that time, Attorney Clayton misrepresented to

Judge Murtha the date when plaintiff was actually informed about the test. As a result, the item in question could not be scrutinized effectively and was not actually seen by plaintiff until the trial. (Complaint section no. 37 (p.30)).

Evidence:

a) Exhibit No. 23 (A.79) - Letter from Attorney Clayton (May 21, 1997) in which plaintiff is finally informed about the alleged newspaper from the VermontState Police and the test on it.

b) Exhibit No. 25 (A.84) - Letter from Stephen Houghton to Attorney Clayton (May 19, 1997), in which the attempt is made to convey the impression that supposedly Clayton is being informed for the first time about the test on the newspaper. (However, the letter from the Mercury Lab (Exhibit No.21 dated March 6, 1997) indicates otherwise.

c) Exhibit No. 24 (A.80-3) - Excerpt from the transcript of the pretrial conference. Note statement by Attorney Claayton to Judge Murtha on page 44, lns. 24-5 (A.81) in which he deliberately misleads the judge about the date when the information about the test was actually sent to plaintiff - "the moment we got that report back from the laboratory." However, as the letter from the Mercury Lab (March 6, 1997) indicates, more than three months elapsed before plaintiff was actually informed.

9) The various fraudulent acts directed by the conspirators at the federal court system commencd with the false promises of evidence made to the Eastern District of Missouri. These included misleading statements regarding alleged "samples" from the site and tests of those samples. (The objective was to change the venue to Vermont where the conspiracy to defraud plaintiff could be executed more effectively,) Complaint,

section no. 9 (pgs.4-6).

Evidence:

A) Exhibit No.2 (A.2) - Excerpts from "Memorandum in Reply" (October 31, 1994) submitted to the E.D. Missouri, which refer falsely to "physical forensic samples taken from the fire scene."

B) Exhibit No. 3(A.3) - Excerpt from "Motion for Change of Venue" (September 28, 1994) in which the allegedly valid "physical evidence" supposedly taken from the subject fire site is cited as important grounds for transferring the case to Vermont.

10) Attorney Harold Eaton of Eaton and Hayes and Attorney Gregory Clayton of Downs Rachlin and Martin and later Aten Clayton and Eaton repeatedly signed and certified written documents, including discovery responses, that present as legitimate the falsified fire investigation based on the fake GC/MS lab tests. (Complaint, section no. 29 - pgs.22-23 provides a list of documents, including some - such as pretrial documents - that were intended to influence the court improperly.)

11) The various, illegal acts perpetrated by defendants constitute a deliberate and systematic violation of their rights and sworn duties as "officers of the court" in both the federal court system and the courts of Vermont.

Evidence:

a) All of the above.

b) Exhibit No.1 - Oath of Admission to the Vermont Bar.

12) The scheme to defraud plaintiff went to the highest level of the law firm of Downs Rachlin and Martin because Attorney Clayton was a director of the firm.

Evidence:

a) Exhibit No. 1 attached to this motion - Affidavit of Gregory Clayton, p.1.

13) Through defendants' fraud and misuse of the federal court system, Plaintiff was deprived illegally of his land, home and the possessions acquired over a lifetime. This extensive loss has caused him personal hardship as well as emotional suffering and unhappiness that has continued over a period of more than ten years.

Evidence:

a) Exhibit no.2 attached to this motion - affidavit of Plaintiff Austin.